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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 510

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, and
RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION,
BALTIMORE & OHIO RAILROAD COMPANY,
and
CHESAPEAKE & OHIO RAILWAY COMPANY,
Appellees.

On Appeal from the United States District Court for the Eastern District of Michigan, Southern Division

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants Brotherhood of Maintenance of Way Employes and Railway Labor Executives' Association appeal from the final judgment and decree of the United States

District Court for the Eastern District of Michigan, Southern Division, entered on August 23, 1963, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the specially constituted District Court of three judges is reported at ..... F. Supp.[1] The report of the Interstate Commerce Commission, styled Chesapeake & Ohio Railway Company — Control — Baltimore & Ohio Railroad Company, appears at 317 I.C.C. 261 (1962). A copy of the opinion of the District Court is attached hereto as Appendix A. A copy of the final judgment and decree of the District Court is attached hereto as Appendix B.

JURISDICTION

This suit was brought under 28 U.S.C., Section 1336, to suspend, enjoin, annul and set aside an order of the Interstate Commerce Commission entered under Section 5 (2) of the Interstate Commerce Act, 54 Stat. 906, 49 U.S.C., Sec. 5(2), authorizing The Chesapeake & Ohio Railway Company to acquire control, through capital stock ownership, of The Baltimore & Ohio Railroad Company and its subsidiaries. The final judgment and decree of the United States District Court for the Eastern District of Michigan, Southern Division, was dated and entered August 23, 1963, and provided for the continuance in full force and effect, pending disposition of this appeal, of that court's temporary restraining order, entered February 1, 1963, preserving the employment status quo on the railroads involved, conditioned upon the docketing of this ap-

[1] The opinion of the District Court is not yet officially reported, but was issued on August 13, 1963, in Civil Action No. 23,467.

peal on or before October 1, 1963. Notice of appeal was filed in said court on September 11, 1963.

The jurisdiction of this Court to review the decision below by direct appeal is conferred by 28 U.S.C., Section 1253, 62 Stat. 926.

The following decisions sustain the jurisdiction of this Court to review the final judgment and decree of the District Court on direct appeal in this case:

Railway Labor Executives' Association v. United States, 339 *U.S.* 142.

United States v. Lowden, 308 U.S. 225.

Interstate Commerce Commission v. Railway Labor Executives' Association, 315 U.S. 373.

The principal statutory provisions involved are Section 1336, 1398, 2284, and 2321 through 2325 of the Judicial Code (29 U.S.C., Sections 1336, 1398, 2284, 2321-2325), relating to jurisdiction and venue, and procedure to be followed generally in suits of this sort; Sections 8 and 10 of the Administrative Procedure Act (5 U.S.C., Sections 1007 and 1009) setting forth standards to be observed by administrative agencies, including the Interstate Commerce Commission, in their decisions, and provisions with respect to judicial review of their actions; and Section 5 of the Interstate Commerce Act (49 U.S.C., Sec. 5) governing Commission action with respect to combinations and consolidations of carriers, including acquisitions of control such as the transaction here involved. The particularly pertinent provisions of the Administrative Procedure Act and the Interstate Commerce Act are set forth in Appendix C attached hereto.

QUESTIONS PRESENTED

The questions presented by this appeal are as follows:

(1) Whether the refusal of the Interstate Commerce Commission to consolidate the interrelated applications for joinder of other railroads violated statutory mandates of the Interstate Commerce Act and the Administrative Procedure Act which forbid arbitrary and capricious action, as well as the Due Process requirements of the Fifth Amendment of the United States Constitution.

(2) Whether the Interstate Commerce Commission's failure to consider "public interest" factors violates the statutory mandate of the Interstate Commerce Act.

(3) Was the decision and order of the ICC approving control of the B&O by the C&O based upon adequate findings supported by substantial evidence warranting the conclusion that such transaction is consistent with the public interest?

(4) Was the Commission's conclusion that the disadvantages of the proposed transaction to other railroads and, consequently, the public interest herein, were not of sufficient magnitude to offset the supposed public interest in support of the proposed transaction, based upon adequate findings supported by substantial evidence?

(5) Did the Commission's approval of the proposed transaction on the basis only of wholly inadequate evidence presented by the parties before it with respect to the public interest involved and particularly the potential disadvantage to other rail-

roads, and its failure to develop a complete and adequate record through investigation and studies undertaken on its own initiative, if necessary, or in the alternative to deny the application for want of adequate proof, constitute arbitrary and capricious action and an abuse of the Commission's discretion, in excess of its statutory authority?

(6) Did the Commission's failure and refusal to consider the proposed acquisition of the B&O by the C&O in the light of the realignment and changed affiliations of the eastern railroad system that might result from its disposition of other applications pending before it involving proposed mergers of other major eastern carriers, either through consolidation of such proceedings with the instant one or deferring action with respect to the transaction here involved until all such cases could be considered and decided at the same time and in the light of the potential effect of each transaction upon the others, constitute arbitrary and capricious action and abuse of the Commission's discretion, and an abdication of its statutory duty and authority?

(7) Was the conclusion of the Commission that the public interest inthe adequacy of transportation service would be served or advanced by approval of the proposed transaction supported by adequate findings based upon substantial evidence?

(8) Did the Commission fulfill its obligation under Section 5(2) (c) of the Interstate Commerce Act to give weight to the interest of the carrier employes affected when it held the proposed transaction consistent with the public interest on the

basis of speculation and supposition, rather than adequate and specific findings supported by substantial evidence, with respect to the supposed benefits from the transaction, and in the face of a clear showing of tremendous adverse effect that would be visited upon railroad employes?

(9) Did the Court below err in refusing to set aside the order of the Commission on the grounds that it was not based on adequate findings supported by substantial evidence, that it constituted an arbitrary and capricious action and an abuse of the Commission's discretion, and a failure and refusal of the Commission to comply with the requirements of the Administrative Procedure Act and the Interstate Commerce Act?

(10) Whether the failure of the Interstate Commerce Commission to acquire or to use railroad merger expertise is a violation of statutory mandates of the Interstate Commerce Act and the Administrative Procedure Act?

(11) Whether the Interstate Commerce Commission violated due process by denying the fair hearing required by the Fifth Amendment of the United States Constitution?

(12) Whether the public interest standard of the Interstate Commerce Act as interpreted and adminstered by the Interstate Commerce Commission constitutes an invalid delegation of legislative power and a denial of due process under the Fifth Amendment of the United States Constitution?

STATEMENT OF THE CASE

By applications filed on June 14, 1960, the Chesapeake & Ohio Railway Company ("C. & O.") sought authorization from the Interstate Commerce Commission (1) under Section 5(2) of the Interstate Commerce Act (49 U.S.C., Sec. 5(2)) to acquire control of the Baltimore & Ohio Railroad Company ("B. & O.") through ownership of its capital stock, and by virtue of such stock control, indirect control of the common-carrier subsidiaries of the B. & O., and (2) under Section 20(a) of the Act (49 U.S.C., Sec. 20(a)) to issue not exceeding 2,055,398 shares of its authorized but unissued common stock in exchange for capital stock of the B. & O., to effectuate such acquisition of control. It was indicated that such control was intended as the first step looking towards eventual merger of the B. & O. into the C. & O.

On June 24, 1960, the Commission permitted intervention in those proceedings by the New York Central Railroad Company, which subsequently filed applications of its own (Finance Dockets Nos. 21237 and 21238) to acquire control of the B. & O., which applications were consolidated and heard with those of the C. & O. The B. & O. intervened and supported the application of the C. & O., and numerous other parties, including the Railway Labor Executives' Association, plaintiff-appellant here, were permitted to intervene. Hearings were held commencing June 19, 1961, and were concluded on October 9, 1961, after the amassing of 5,686 pages of hearing transcript and receipt of a total of 546 exhibits, many of them detailed and voluminous.

During the hearing the intevener, Chicago and Eastern Illinois Railroad, which till then had demonstrated serious concern over the effect on it of the enhanced competitive power of the proposed C. & O. — B. & O. alliance, withdrew from further participation for the reason that its attorney

had been advised of the impending filing of an applicaiton by the Louisville & Nashville Railroad Company for authority to control the C. & E. I. (Tr. 3138-3139.)[2] After the close of the hearing the New York Central, which had been throughout the most vigorous and active protestant against the application of the C. & O., was permitted to withdraw as an intervener and to dismiss its applications for control of the B. & O. shortly after the filing of an application for Commission approval of a merger between the Central and the Pennsylvania Railroad Company.

Thereafter, on May 1, 1962, the recommended report and order of Examiner Bradford, recommending approval of the C. & O.'s application, was served. Exceptions to said recommended report and order were filed by the Association and other protesting interveners.

Subsequently a number of motions were filed requesting that the Commission consolidate the application of the C. & O. with its then pending proceedings in Finance Docket Nos. 21510, et al., *Norfolk & Western Railway Company and New York, Chicago & St. Louis Railroad Company — Merger,* and related cases (hereinafter referred to as N. & W. — Nickel Plate merger case, and Finance Dockets Nos. 21989 and 21990, *Pennsylvania Railroad Co. — Merger — New York Central Railroad Co.* (hereinafter referred to as Pennsylvania — Central merger case). The consolidation sought by these motions varied, from requests for reopening of testimony with a consolidated record for the three transactions, to consolidation for decision, or merely separate decisions issued simultaneously, but the motions were all denied in the decision of the Commission which is the subject of this action.

On December 31, 1962 the Commission issued its order,

[2] "Tr.", reference is to transcript of hearings before the commission's Examiner Bradford.

dated December 17, 1962, and to become effective on February 4, 1963, granting the applications of the C. & O. and authorizing its acquisition of control of the B. & O. subject to certain conditions. The Commission's report includes a dissenting opinion by Commissioner Tucker, joined in by Commissioner Webb (317 I.C.C., 293), and a dissent by Commissioner Bush (317 I.C.C., 332).

The purported objective to be achieved by the application of the C. & O., and the primary public interest which the majority of the Commission found would be served by C. & O. control of the B. & O., was the possibility of rehabilitation and modernization of the latter's physical plant and strengthening of its financial position, so as to improve the competitive quality of its transportation service. It found that the B. & O. was in a precarious financial position and unable to accomplish the desired rehabilitation by itself; that the C. & O., while making no commitments or guarantees of financial support, had the strength to render such aid; and that it could be relied on to assist the B. & O., in various ways because of its own stock interest in the B. & O., and the agreement and understanding that the present control transaction was merely a prelude to a complete merger of the two companies in the near future.

With respect to other public interest factors involved, the majority recognized that its obligation, under Section 5(2) of the Interstate Commerce Act, to give weight to the effect of the proposed transaction upon adequate transportation service to the public, encompassed the duty to consider "the effect of the control on competitors and on the general competitive situation in the industry." On this vital point, in spite of the voluminous record made in the Commission proceedings, the only substantial evidence before the Commission consisted of traffic studies introduced by the New York Central, and by the C. & O. and B. & O.,

relating to potential diversion of traffic that might be suffered by the Central, which studies were admittedly limited and inadequate, completely conflicting in their conclusions, and conceded by the Commission to have been prepared on different bases and to be not comparable. There was no evidence specifically directed to the potential diversion of traffic from any carrier other than the Central. The only other testimony relating to the competitive effect of the transaction consisted of opinions of shipper witnesses that control of the B. & O. by the C. & O. would not cause them to change their routing practices or divert traffic from the Central unless the latter's service should deterioriate; and representations by executives employed by the C. & O. and the B. & O. that they would "refrain from a deliberate policy of preferential routing or of otherwise raiding the traffic of other railroads in the East."

On the basis of this record, the majority of the Commission, while concluding that the New York Central's estimate of a potential diversion of 41% of its traffic had "little probative value" and was based on "highly speculative" assumptions, failed to indicate concurrence with the assertions of the C. & O. and B. & O. that the Central could suffer little or no diversion. It simply found that while "at present Central is not well able to absorb any substantial loss of traffic", it did not appear that there would be any "undue" diversion of traffic from Central. The same conclusion was stated with respect to "other rail carriers", without mentioning any of them by name or discussion of any evidence dealing with the impact of the proposed transaction upon them.

No consideration was given by the majority to possible cumulative adverse effects of the proposed transaction upon other Eastern railroads when coupled with additional major railroad realignments that might result from Commission action in other pending merger or acquisition proposals,

such as the N. & W. — Nickel Plate, and Pennsylvania — Central merger cases.

The majority of the Commission recognized that the proposed transaction would entail "substantial hardship" to employees of the carriers, and adversely affect business in their communities, noting that on the basis of the applicant carrier's estimates coordinations would displace 1,164 employees and deprive 730 of employment, and that the modernization program would displace 2,377. (317 I.C.C., 285.) However, it concluded that this did not constitute ground for denying the application, and simply imposed protective conditions under Section 5(2) (f) of the Act "In order that hardships to employees may be alleviated", but limited that protection to employees of the particular carriers involved in the transaction. (317 I.C.C., 286-287.)

The lengthy dissenting opinion by Commissioner Tucker, joined in by Commissioner Webb (317 I.C.C., 293-332), stressed the lack of such urgent need on the part of the B. & O. as to justify precipitous approval of this transaction without regard to the outcome of other pending merger cases; the failure of the record to support the conclusion that C. & O. control was necessary for the desired rehabilitation of the B. & O. or that there was any certainty, in the form of solid commitments by the C. & O., that control would achieve that objective; the absence of adequate findings, based on substantial evidence, with respect to the competitive repercussions of a C. & O. — B. & O. affiliation upon other Eastern railroads; and the danger of pre-judging the other pending merger cases by approval of a carrier combination whose increased strength would have to be offset by alliances of other carriers. Commissioner Bush joined the other dissenting Commissioners in expressing concern over the uncertainty of achieving the desired objectives through a control transaction rather than outright

merger of the two carriers, and the manjority's refusal to consolidate this case with the pending N. & W. — Nickel Plate and Pennsylvania — Central merger cases, so as to avoid the danger of pre-judging the latter. (317 I.C.C., 332.)

On January 25, 1963, the present action was instituted by the filing of the complaint of plaintiff-appellant Brotherhood of Maintenance of Way Employees, in which the court below was asked to suspend, enjoin, annul and set aside the Commission's order, as arbitrary, capricious and an abuse of administrative discretion, because of the Commission's failure to comply with the requirements of the Administrative Procedure Act with respect to adequate findings based on substantial evidence, and of the Interstate Commerce Act with respect to a determination of whether the proposed control transaction would be consistent with the public interest. Subsequent to the filing of the complaint, the Railway Labor Executives' Association (the other appellant on whose behalf, along with the Brotherhood, this jurisdictional statement is filed), and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, the International Association of Machinists, and the Brotherhood Railway Carmen of America (on whose behalf a separate jurisdictional statement is being filed), were permitted to intervene as parties plaintiff. In addition to the original defendants, the Commission and the United States of America (named as a defendant as required by 28 U.S.C., Sec. 2322), the C. & O. and the B. & O. intervened as parties defendant.

On February 1, 1963, District Judge Thornton entered a temporary restraining order pursuant to consent of the defendants. That order did not restrain the consummation of control of the B. & O. by the C. & O., but prohibited

the carriers from abolishing the position of, furloughing, or transferring the place of employment of, any employee represented by the Brotherhood or any other labor organization whose chief executive is a member of the Association, and who had an active employment status with either of said carriers on February 4, 1963, pending further order of the court sitting as a staututory District Court of three judges in this proceeding, except pursuant to the terms of any implementing agreement that might be negotiated with the appropriate collective bargaining representative of such employee.

The Commission, represented by its own counsel, and the C. & O. and B. & O., actively defended the action.

The United States of America subsequently filed its answer, in which it " . . . admits that the order of the Interstate Commerce Commission is erroneous, in that it is not supported by adequate findings upon substantial evidence with respect to the impact upon other railroads of the proposed acquisition by the Chesapeake & Ohio Rail-Way Company of control of the Baltimore & Ohio Railroad Company, and therefore fails to reflect the consideration required by Section 5 of the Interstate Commerce Act (49 U.S.C. 5) and the National Transportation Policy (49 U.S.C. preceding 1) to be given to the public interest in the effect of the proposed acquisition upon the structure of the railroad industry in the Eastern United States"; " . . . neither admits nor denies any other allegations of the complaint"; and ". . . prays that the order of the Commission be set aside and the case remanded to the Commission for further proceedings."

In brief and argument below the Department of Justice, on behalf of the United States, fully supported the position of the plaintiffs with respect to the inadequacy

of the Commission's findings and lack of substantial evidence regarding the impact of C. & O. control of B. & O. upon other railroads and the arbitrary and improper refusal of the Commission to consolidate or consider jointly this transaction and the other pending Eastern railroad merger cases.

Following extensive briefing and argument on the questions involved, the court below, on August 13, 1963, issued its opinion, dated August 7, 1963, rejecting the contentions of the plaintiffs and upholding the validity of the Commission's order. The judgment appealed from was entered August 23, 1963, and in addition to denying the relief sought and dismissing the complaints of the plaintiffs, provided, pursuant to consent of the parties, that the temporary restraining order of February 1, 1963, be continued in full force and effect pending disposition of this appeal, but on the condition that the appeal be docketed on or before October 1, 1963.

In its rather lengthy opinion the court below reviewed the contentions of the parties, and considered in turn the questions of the adequacy of the Commission's findings and supporting evidence, adequacy of the investigation and hearing conducted by the Commission, the consideration given to the interests of employees, and the failure to consolidate this transaction with the other merger cases. Its consideration of the issues raised in this action was prefaced by a gratuitous discussion of the necessity and inevitability of railroad merger, and an emphasizing of the limited scope of the judicial review which it felt was available in proceedings of this sort. It then proceeded to hold that the Commission's findings that the C. & O. could assist in rehabilitation of the B. & O. were supported on the record and "add weight" to the Commission's ultimate conclusion of consistency with the public interest; that it was suffi-

cient for the Commission to find that no "undue" amount of traffic would be diverted from the Central or other railroads; and that the traffic studies described above, with respect to the potential effect of the transaction on the New York Central, plus the opinions of shipper witnesses that they would not change their habits in routing traffic because of the control of the B. & O. by the C. & O., and representations by executives of the C. & O. and B. & O. that they would not try to divert traffic away from competing roads, all reinforced by the Commission's "expertise", constituted substantial evidence to support such finding. The court then endorsed the Commission's conduct of the hearings before it, and its "adversary proceeding" concept of a Section 5(2) investigation, excusing the Commission's failure to develop a more adequate record, on the public interest factors which the statute requires it to consider, with the observation that no interested party was foreclosed from offering any evidence it wished to offer, and that it was not the Commission's job "to actively promote opposition to applicants before it." As to the interests of employees who would be adversely affected, the court adopted the Commission's attitude that the imposition of protective conditions under Section 5(2) (f) of the Act obviates the necessity of complying with the mandate of Section 5(2) (c) that the interests of employees be weighed along with the other public interest considerations in passing upon a proposed transaction. And finally, the court held that whether or not this case should have been considered in the light of other pending merger cases lay within the Commission's discretion; that "The Commission's decision exposes its reason for such exercise of discretion"; and mistakenly equated plaintiffs' contentions with advocacy of a "master plan" approach to the question of rearrangement of the nation's railroad system.

As indicated by the foregoing enumeration of "Questions Presented", this case involves not only issues with respect to the Commission's compliance with the requirements of the Interstate Commerce Act and the Administrative Procedure Act, but also raises constitutional questions of denial of due process of law and invalid delegation of legislative power. We understand that these constitutional questions will be discussed in the separate jurisdictional statement being filed on behalf of appellants Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, International Association of Machinists, and Brotherhood Railway Carmen of America.

We think it is apparent from the foregoing somewhat lengthy statement that the questions involved here are of a most substantial nature, and that the outcome of this case is of vital importance in the reshaping of the entire railroad system in the Eastern part of the country. Accordingly, while we shall attempt to point out the nature of the more important questions, we will not burden the Court with extended argument at this time.

THE QUESTIONS ARE SUBSTANTIAL

The present case is of vital importance in determining the future alignment of the major railroad systems in the Eastern part of the country. It involves a determination of the extent to which the Commission is to be given free rein to determine that future with little more than superficial judicial review of its decisions. And the recent deluge of railroad merger and control proposals emphasizes the need for consideration and determination by this Court of the validity of the adversary procedure method with which the Commission has approached the performance of its func-

tion as guardian of the public interest under Section 5(2) of the Act.

The case further involves the question of whether the requirements of the Administrative Procedure Act are to be emasculated by the endorsement of such token compliance with its requirement of adequate findings as is illustrated by the Commission's action here, where its so-called findings on the most vital object of its investigation — the potential effect of the proposed transaction upon other railroad carriers — are not findings at all, but ultimate conclusions unsupported by any subsidiary findings, and constituting, in the words of dissenting Commissioner Tucker, "a groping, meaningless generalization". Closely related is the question of the substantiality of evidence required by the Administrative Procedure Act to support required findings of the Commission, and whether performance of that tribunal's statutory function is to be measured by the "scintilla" rule of evidence, or whether Congress intended it to assume a more responsible role in protecting the public interest.

With respect to the Commission's statutory duty to give consideration to the interests of railroad employees as part of the public interest to be weighed in passing upon these transactions, an obligation long recognized, by this Court, it is submitted that the erroneous approach adopted by the Commission and endorsed by the court below assumes added importance by virtue of the almost catastrophic reduction in railroad employment which this country has experienced in recent years, coupled with the threat of further drastic inroads posed by this and other pending merger and control proposals in the industry.

In many aspects the action of the Commission in this case, and the ruling of the court below, are at odds with

previous decisions of this Court. The importance of a thorough review of the questions here presented, and the necessity of supplying the Commission with guideposts to be followed, in its processing of this and other cases which seem about to reshape the entire railroad industry, can hardly be overstressed.

1. The control transaction here involved, represented by the applicant carrier and found by the Commission to be simply the first step towards a complete merger of the two railroads, is not an alliance "of the large and small railroads" such as the court below adverted to in its comments on the inevitability and desirability of railroad mergers. This is a combination of the two of the giant companies of the industry, each having assets in excess of one billion dollars. And it is but the first to reach decision of the pending merger and control cases involving almost the entire railroad system in the East.

By refusing to consolidate this case with the pending N. & W. — Nickel Plate, and Pennsylvania — Central cases, either for hearing or merely for decisional purposes, the Commission automatically made unavailable to itself evidence which was vital to any meaningful determination of the competitive effects of this proposal upon other railroads, and concomitantly its effect on employees of other roads both mandatory statutory considerations. Knowledge as to whether or not the Central will be merged with the Pennsylvania, or the N. & W. with Nickel Plate, is an absolute pre-requisite to any meaningful determination of the effect that a C. & O. — B. & O. combination, either alone or accompanied by consummation of one or another of the other two mergers, would have upon the Central and the N. & W.

Moreover, the Commission's action has rendered it

important to exercise the kind of control and supervision of the proper development and maintenance of the country's railroad system which is its statutory province. It has unquestionably placed itself in the position of having prejudged the other two merger cases, irrespective of what their individual merits may prove to be, by creating a C. & O. — B. & O. combination of such increased competitive strength that serious injury to the Central and the N. & W. can only be avoided by approval of the alliances which they propose.

2. The narrowly limited concept of the scope of available judicial review of the Commission's orders which characterizes the opinion of the court below is clearly at odds with decisions of this Court. The opinion below treats the Administrative Procedure Act as if it were non-existent, whereas this Court, in *Universal Camera Corp. v. National L. R. Bd.*, 340 U.S. 474, emphasized the substantial broadening of the scope of judicial review which was brought about by that Act.

The District Court has in effect adopted almost a "scintilla" rule of evidence for purposes of its review of the Commission's order. Clearly the "substantial evidence" test which the court purported to apply is the one prevailing prior to the enactment of the Administrative procedure Act, and entirely failed to observe this Court's admonitions, in *Universal Camera*, that "The substantially of evidence must take into account whatever in the record fairly detracts from its weight", and that "Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function."

3. The Commission's failure to develop an adequate record on its own initiative, or in the alternative to deny the application, and its treatment of the case as if it were

an adversary proceeding, constituted an abdication of the Commission's statutory function and responsibility as guardian of the public interest. Both the Commission and the court below treated the absence of opposing evidence as tantamount to proof that the proposed control transaction was consistent with the public interest.

The comments of the court below plainly reveal its misconception of the Commission's proper function, and the purpose of a Section 5(2) investigation. Thus, it is stated that "no interested party was foreclosed from offering any evidence that it wished to offer", and that "there is nothing in the statute requiring the Commission to actively promote opposition to applicants before it." It was not, of course, suggested to the court that the Commission had to *oppose* applicant's evidence, but rather that it had a duty to see that substantial evidence, covering the phases of the public interest which it was obliged to consider, was available to it before an application would be approved. The public interest cannot be protected if the Commission is going to grant applications by default. It does not have a duty to develop evidence in opposition to applications, but it does have to insist on the development of a sufficient record to enable it to exercise an informed judgment on requisite public interest considerations. In this case, the most vital such consideration was the competitive effect of the proposed transaction on other railroads, and it is on that point that the record is most inadequate.

4. The record before the Commission did not contain substantial evidence to support its conclusion that the C. & O. — B. & O. combination would not result in any "undue" diversion of traffic from other railroads. There was no evidence specifically directed to any carrier other than the Central. As to it, the Commission said, of the only traffic studies before it, that "They vary widely", "were

prepared on different bases", and "In many respects they are not comparable". The only other "evidence" on potential traffic diversion from the Central or other carriers consisted of the testimony of shippers that stock control of the B. & O. by the C. & O. would not cause them to take their business away from other railroads, and assurances by executives of the C. & O. and B. & O. that they would not undertake to raid the traffic of other Eastern roads.

In appraising this evidence as substantially supporting the Commission's conclusion, the court below ignored the precepts of the *Universal Camera* case, completely failing to consider and "take into accout whatever in the record fairly detracts from its weight".

As to the traffic studies relating to the Central, consideration of the record as a whole indicates that as between the two, the studies offered by Central had more probative value than those of applicant. The former were made on the assumption of a strengthened C. & O. — B. & O. system whose competitive position would be greatly enhanced; whereas the C. & O., though urging in the case the need for a rehabilitated B. & O. better able to complete economically and efficiently, yet based its studies on the assumption that the present competitive abilities of the three carriers would remain unchanged. (See dissent by Commissioner Tucker, 317 I.C.C., 320-325.)

The representations by executives of the C. & O. and the B. & O. as to what they would or would not do, with respect to seeking traffic currently carried by other roads, hardly achieve the stature of "evidence". Testimony by shippers that mere stock control by C. & O. would not change their routing habits misses the point; for the basic question is whether their business might be attracted by a strengthened C. & O. — B. & O. system able to offer im-

proved service. And with respect to this testimony the record before the Commission was replete with evidence, which "fairly detracts from its weight", to the effect that such factors as service, terminal facilities, special equipment, car supply, and other improvements that a rehabilitated B. & O. might offer to shippers, are predominant in the field of traffic solicitation.

It is evident that the court below did not exercise its "conventional judicial function" as a reviewing court, but simply looked for some evidence to support the Commission's conclusion, without questioning the caliber of the evidence or considering any other evidence detracting from its weight or pertinency.

5. The inadequacy of the Commission's so-called "findings" here is most apparent. Its statements that no "undue" amount of traffic would be diverted from other carriers, and that their ability to serve the public would not be "seriously" affected, are not findings at all but ultimate conclusions, obviously mere *pro forma* attempts at compliance with the statutory mandates. There is no subsidiary finding of how much traffic would be diverted from Central or any other railroad, in spite of the conclusion of the Commission that Central was not able to absorb *any* substantial traffic loss. *Nothing whatsoever* is said with respect to the ability of "other carriers" — none being individually identified or separately considered — to withstand traffic diversion. And, as we have noted, there are no findings appraising the potential competitive effects of the affiliation of C. & O. and B. & O. in the light of approval or disapproval of either or both of the other large merger cases now pending.

We submit that in this case, the approach of the Commission and the court below to the question of the nature

of findings required is the same as that recently condemned by this Court in *Burlington Truck Lines v. United States*, ... U.S. ....., 9 L. Ed. (2d) 207 (Dec. 3, 1962). And in a proceeding of such magnitude and far reaching importance to the future of the railroad industry as this one, there is more rather than less need for clear and concise findings on mandatory considerations of public interest, with thorough and rational analysis of the facts supporting the Commission's decision.

6. This Court has long recognized the obligation of the Commission to give weight to the interest of railroad employees in ascertaining the public interest with respect to transactions before it. *United States v. Lowden*, 308 U.S. 225. Such a requirement is expressly imposed by Section 5(2) (c) of the Interstate Commerce Act; and the Commission has formally recognized that the requirement is not obviated by imposition of employee protective conditions under Section 5(2) (f).

The imposition of protective conditions for the benefit of employees is only a partial remedy designed to mitigate or alleviate, by a system of compensatory allowances for a limited period, employee hardship resulting from alterations in carrier relationships already adjudged by the Commission to be in the public interest. The prospect that such conditions will be imposed does not, as the court below seemed to think, remove adverse effect upon employees as an element to be considered in making the initial public interest determination. Moreover, the Commission has refused to afford protection to employees of any but the carriers directly involved in the transaction, so that here no benefits would be available for employees of competing carriers affected by traffic diversion. In view of the inadequacy of the record on this subject, it is impossible

to predict the severity of the impact of this control transaction upon such employees.

Had the Commission and the court below complied with the obligation to consider the interests of employees in a proper balancing of public interest factors, we submit that the speculative nature of the benefits to be achieved as a result of C. & O. control of B. & O. would have been outweighed by the certain and admitted severe impact on employees. And there is little doubt that the scales would be tipped against approval of the transaction if proper consideration were given, upon an adequately developed record, to its competitive effects on other railroads.

CONCLUSION

For the foregoing reasons, it is submitted that the questions presented by this appeal are substantial and of such public importance as to justify plenary consideration by this Court.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, Plaintiff,	)	
RAILWAY LABOR EXECUTIVES' ASS'N., Intervenor Plaintiff,	)	
BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, THE INTERNATIONAL ASS'N OF MACHINISTS, AND THE BROTHERHOOD OF RAILWAY CARMEN OF AMERICA, Intervenor plaintiffs,	)	No. 23,467
vs.	)	
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants,	)	
BALTIMORE & OHIO RAILROAD COMPANY, Intervenor Defendant,	)	
CHESAPEAKE & OHIO RAILWAY COMPANY, Intervenor Defendant.	)	

Before O'SULLIVAN, Circuit Judge, THORNTON and ROTH, District Judges.

O'SULLIVAN, Circuit Judge. This statutory three-judge court was convened upon the filing of a complaint by the Brotherhood of Maintenance of Way Employees against the United States and the Interstate Commerce Commission. 28 U.S.C.A. §§1336, 1398, 2284 and 2321-2325. The complaint attacks the validity and sufficiency of the report and order of that Commission which, pursuant to 49 U.S.C.A. §5(2), approved, under specified conditions, the acquisition by the Chesapeake & Ohio Railway Com-

pany of capital stock control of the Baltimore & Ohio Railroad Company. The Commission also approved the issuance by the C & O of the required number of shares of its own authorized stock in exchange for capital stock of the B & O. 49 U.S.C.A. §20(a). The Commission's report is styled Chesapeake & Ohio Railway Company — Control — Baltimore & Ohio Railroad Company, 317 I.C.C. 261 (1962). Subsequent to the filing of the complaint, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and others, were allowed to intervene as parties plaintiff, and the above mentioned railroads were permitted to intervene as parties defendant. We shall refer to the C & O acquisition of B & O stock as the C & O-B & O affiliation.

Broadly stated, the attack upon the Commission's report and decision is bottomed upon plaintiffs' and intervenors' contentions that the report contained insufficient findings upon which to base its conclusion; that the Commission gave inadequate consideration to the effect of the affiliation upon other railroads and railroad employees, and upon the public; and that the Commission erred in denying motions made by intervening opponents of the C & O application to defer decision on the matter and to consolidate the hearing before it with other pending matters.[1] The Department of Justice supported such motions.[2] The other matters pending were the merger application of

[1]These motions were made after the record had been closed. The hearings had extended from June 19 to October 9, 1961. They were held in seven cities, some 394 witnesses were heard, whose testimony resulted in a transcript of 5686 pages and some 550 exhibits were received. Upwards of 100 intervenors appeared, many of whom opposed the C & O applications. More than 60 attorneys appeared for the intervenors.

[2]After the commencement of this cause, the Attorney General of the United States, appearing on behalf of the United States, the statutory defendant, filed an answer which "admits that the order of the Interstate Commerce Commission is erroneous, in that it is not supported by adequate findings upon substantial evidence with respect to the impact upon other railroads of the proposed acquisition * * *." The formal prayer of his answer is "that the order of the Commission be set aside and the case be remanded to the Commission for further proceedings". His briefs and arguments to this court,

the New York Central Railroad Company and the Pennsylvania Railroad Company, and the unification application of the New York, Chicago and St. Louis Railroad Company (The Nickel Plate), the Wabash Railroad Company and the Norfolk & Western Railroad Company. These applications are pending before the Commission, and are at intermediate stages in the hearings necessary to final decision.

It should be preliminarily observed that there is little dissent from recognition that if the railroads of this country are to survive as instrumentalities to adequately serve the transportation needs of the country, mergers of the large and small railroads in various groupings will have to take place. The record before us seems to make clear that this trend to merger will likely eventuate in there being substantially fewer independently operating railroad systems serving the northeast quadrant of the United States than now exist. It may be that the ultimate grouping into these major railroad systems will follow the lead made by the larger railroads now applying for approval of plans presently before the Commission. It should be borne in mind, however, that the Transportation Act of 1940, 54 Stat 899, 49 U.S.C.A., §1, et seq., does not give to the Commission or to the courts any power to compel the regrouping of the railroads involved, or to require any railroad to merge or join with any other railroad. *St. Joe Paper Co vs Atlantic Coast Line R. Co.*, 347 U.S. 298, 305, 98 L. Ed. 710, 719. As early as 1920, Congress recognized that the health of our railroads could only be protected by merging into fewer systems the facilities and economic power of the

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Footnote 2, cont'd.

however, may be fairly read to be his request that such further proceedings include the consolidation of the C & O application with two railroad merger applications now before the Commission, and to withhold decision of the C & O matter until conclusion of the hearings on such other applications, to the end that a contemporaneous decision might be made of all the pending control and merger applications which involve the eastern railroads.

great number of railroads then in existence in the United States. To serve that end, Congress enacted the Transportation Act of 1920, which directed the Interstate Commerce Commission to consider the problems of consolidation, make the necessary investigations, and to go forward with a national plan for bringing about such a reorganization of the railroads of this country. The Transportation Act of 1920 directed the Commission to "prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems". 41 Stat. 481. No good purpose would be served by here detailing the history of the efforts of the Commission and Congress to provide for compulsory reorganization of the country's railroads. A summary of that history may be found appended to the opinion of the Supreme Court in *St. Joe Paper Co vs Atlantic Coast Line R. Co.*, 347 U.S. 298, 315-321, 98 L. Ed. 710, 724-727. Suffice it to say that by 1940 it was apparent to both the Commission and Congress that the national plan was a failure. *Schwabacher vs United States*, 334 U.S. 182, 193, 92 L. Ed. 1305, 1313. Congress then took a new approach in the Act of 1940 by authorizing that the needed mergers be initiated and carried out by the voluntary and private action of the railroads involved, subject always to the supervision and approval of the Interstate Commerce Commission. *Schwabacher vs United States*, 334 U.S. 182, 193, 92 L. Ed. 1305, 1313. It might be well to mention at this time that during the year 1962, interested parties sought to have Congress declare a moratorium upon the accomplishment of mergers of railroads with assets in excess of $200,000,000.00, unless the mergers met the standards of the anti-trust laws. Although extensive hearings were conducted, at which both proponents and opponents of the Interstate Commerce Commission's case-by-case approach to the merger problem were heard, no legislation has emerged from the proposal. See, *Hearings on S. 3097 Before a Subcommittee of*

the Senate Committee on the Judiciary 87th Cong., 2d. Sess. (1962).

The action of the C&O and B&O railroads here under consideration was initiated by these railroads pursuant to the 1940 Act. The Commission, in considering the application of the C &O for control of the B & O, was bound to consider whether or not the sought for control would be consistent with the present policy of Congress, and whether or not it would be detrimental to or inconsistent with the public interest, the interest of labor, and whether overall desirable ends would be served by allowing a reorganization of railroads through stock acquisition, mergers, and otherwise. See, *New York Central Securities Corp vs United States*, 287 U.S. 12, 25, 77 L. Ed. 138, 146; *McLean Trucking Co vs United States*, 321 U.S. 67, 87, 88 L. Ed. 544, 556-557.

The pertinent statutory authority under which the attacked action was taken, Title 49, U.S.C.A., Section 5(2), sets forth in subparagraph (c) thereof the matters that must be considered by the Commission before approving such action:

> "(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."

Subparagraph (b) of §5(2) authorizes approval of a proposed transaction, if the Commission finds that it "will

be consistent with the public interest". In its report, the Commission asserts that it found the proposed affiliation consistent with the public interest, and that it took into consideration all of the above matters required of it and sets forth in extensive detail its review of the evidence, its appraisal thereof, and the weight given to it. It made findings of fact from that evidence and concluded that all of the criteria necessary for its approval of the C & O-B & O affiliation had been established. Commissioner Tucker, with the concurrence of Commissioner Webb, dissented.[2] Commissioner Bush filed a separate dissent, limited to his position that the C & O-B & O matter should be heard only as a merger proposal, and consolidated for decision with the PRR-NYC and the N & W-Nickel Plate cases.

In this lawsuit, our review of the Commission's action is a limited one. We do not start anew and, on the basis of our own judgment, determine whether acquisition of control of the B & O by the C & O should be approved. Congress has committed that judgment to the discretion of the Commission. *Minneapolis & St. Louis R. Co vs United States*, 361 U.S. 173, 188-189. We are limited to determining whether any errors of law were made by the Commission, whether its action was arbitrary, capricious, or an abuse of its discretion, and, upon review of the whole record, whether its findings of fact are supported by substantial evidence. Title 5, U.S.C.A., Section 1009(e); *Universal Camera Corp vs NLRB*, 340 U.S. 474, 95 L. Ed. 456. See also, *General Motors Corp vs United States*, 207 F. Supp. 641, 643-644 (E. D. Mich., 1962); *United States vs Pierce Auto Freight Lines*, 327 U.S. 515, 90 L. Ed. 821;

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[2]Dissenting Commissioner Tucker agrees that there is critical need for prompt action in railroad rearrangement. Referring to such problem he says, "Seldom has any single problem of the American economy received so much attention from so many sources *with so few results*. * * Eastern railroad problems must not be minimized. *Prompt and positive action* by the Commission has been urgently called for and *no doubt is needed*." (Emphasis supplied) 317 I. C. C. at 295, 297

Mississippi Valley Barge Line Co vs United States, 292 U.S. 282, 78 L. Ed. 1260. If the findings of the Commission are supported by substantial evidence on the whole record, we may not set them aside. Likewise, the weighing of the evidence is reserved exclusively for the Commission. *United States vs Carolina Freight Carriers*, 315 U.S. 475, 490, 86 L. Ed. 971, 983. It is not within the province of the reviewing court "to substitute inferences of its own for those drawn by the Commission from testimony and • • • to weigh anew conflicts in it." *Chicago St. P., M & O. R. Co vs United States*, 322 U.S. 1, 3, 88 L. Ed. 1093, 1095.

The primary question before us is whether the findings of the Commission are supported by substantial evidence on the whole record. As discussed more fully below, we hold that they are.

1. *ADEQUACY OF THE COMMISSION'S FINDINGS*[4]

The Commission found that the B & O Railroad was in precarious financial condition. Its trackage, its rolling stock and other equipment had reached such a state of disrepair and inadequacy that its continued existence as a transportation facility was in serious jeopardy unless adequate financing and other help could be obtained to restore it to economic and physical health. The Commission concluded that the B & O railroad could not, by its own resources or by its borrowing power, obtain needed financing. This finding was supported by substanial evidence in the record made before it. There was evidence, and the Commission found, that the C & O, with control of the stock of the B & O, was in a position, by the use of its own resources and credit, to provide the means whereby

[4]For convenience of discussion, we shall refer to the plaintiff, intervening plaintiffs, and the Department of Justice as the plaintiffs; and to the defendant Commission and the intervening railroads, the C & O and B & O, as defendants.

the B & O could recover from its depressed condition and be restored to a healthy and economically sound transportation system. In addition to direct financial support to the B & O, the Commission found from evidence before it that the affiliation sought would provide opportunity and motivation for cooperative effort by the C & O and B & O; that substantial economies could be effected by the use of joint facilities and personnel and the pooling of equipment; and that such accomplishments would permit the B & O to "become a stronger railroad and the efficency and economy of its operations will be increased". The Commission found, on the evidence, that "Strengthened as a result of the control, B & O's ability to meet the needs of commerce and the national defense will be enhanced". We are impressed that there was substantial evidence in the record to support such findings and that such findings add weight to the Commission's ultimate conclusion that the C & O-B & O affiliation was consistent with the public interest.

> "* * * the term 'public interest' * * * is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities * * *". *New York Central Securities Corp vs United States*, 287 U.S. 12, 25, 77 L. Ed. 138, 146

The most active adversary of the C & O-B & O railroads during the hearings was the New York Central Railroad. It contended that to allow C & O to acquire B & O would cause it irreparable damage in that their combined strength would divert a very substantial portion of the traffic of the New York Central. It had employed experts who made studies of the claimed diversion. They testified to their opinion that the C & O-B & O affiliation would divert 41% of Central's traffic. Such estimate was opposed

by evidence offered by the C & O and full play was given to the evidence and arguments upon the issues drawn by the principal adversaries. The Commission's report adequately reviewed the weight it gave to the evidence offered by these adversaries upon the question of the effect of the proposed affiliation upon diversion of traffic, not only upon Central but upon other railroads that might be affected by the operations of the C & O-B & O. The Commission was of the opinion that the conclusion of Central's experts was unwarranted.

It is the contention of the plaintiffs here, however, that the Commission's finding that "no undue amount of traffic will be diverted from Central" is inadequate. They contend that it should have made a specific determination as to how much traffic would be diverted from Central. We cannot agree. The Commission was not required to engage in speculation and guesswork to come up with a precise percentage prediction. In its findings, the Commission carefully reviewed the testimony given by Central's witnesses, gave its reasons why it found their estimates unreliable, and reviewed the evidence supportive of its conclusion that the claimed diversion of traffic from Central would not be undue. The Commission said:

> "We have carefully examined the estimates of traffic diversion submitted by Central and by C & O-B & O. They vary widely in their estimates of the amount of traffic subject to diversion and were prepared on different bases. In many respects they are not comparable. Based on these estimates, their background material, and other information of record, including particularly the effect of the transaction on the Nation's railroads and, in turn, on the public, we conclude that no undue amount of traffic will be diverted from Central. We have found from our past experience in similar proceedings that the diversion of traffic in the volume predicted rarely, if ever,

> occurs. Although we realize that at present Central is not well able to absorb any substantial loss of traffic, we believe that the benefit to the public from approval here will far outweigh the harm to Central. The findings here specifically provide that interested parties may file applications for modifications of the routing and channels of trade conditions and this would be adequate to protect Central from all except ordinary traffic solicitations to which it is now exposed in the normal course of its business. We conclude that the prospective loss of revenue to Central is not such as to require disapproval here." 317 I.C.C. at 282, 283.

We are of the opinion that this was sufficient.[5] Cf., *McLean Trucking Co vs United States*, 321 U.S. 67, 89.

A further contention of the plaintiffs is that even though the Commission considered the question of diversion of traffic from New York Central, it did not extend its consideration to the amount of traffic that will be diverted from other railroads not parties to the proceeding. We find that early in its report the Commission said, "As indicated hereinafter, it does not appear that there will be any undue diversion of traffic from Central by reason of the C & O-B & O affiliation or *that any rail Carrier will be unduly injured*. It is significant that no other railroad seeks to be included in the C & O-B & O control transaction. * * * We conclude later herein that approval of the control in this proceeding will not result in any undue diversion of traffic from Central *or other rail carriers*". (Emphasis supplied) 317 I.C.C. at p. 265.

In addition to the Commision's right to rely on its own expertise and judgment, *Market Street R. Co vs Railroad Com. of Cal.*, 324 U.S. 548, 560, 561, it had substantial evidence before it from which to draw its conclusion that

[5] After the conclusion of the hearing, Central withdrew its opposition to the proposed affiliation, and has not joined the plaintiffs in the case before us.

neither from the standpoint of competition nor diversion of traffic would other railroads be unduly prejudiced by approval of the C & O application. Representatives of a large number of the major shippers using the eastern railroads tesified that the C & O-B & O affiliation would not cause any change in their habits of chosing rail carriers for their traffic. These witnesses did not limit their observations to diversion of traffic from the New York Central, but included eastern rail carriers generally in their opinions. Shippers are the primary source of all freight traffic and their opinions are, accordingly, of impressive weight. In addition to such testimony, informed representatives of the C & O and B & O testified that the control sought would not result in substantial diversion of traffic from their rail competitors. The briefs of plaintiffs here do not persuade us that such evidence was seriously impeached and the credibility of such witnesses and the weight of their testimony were for the Commission.

In addition to the Commission's findings, quoted above, it further expressed itself on the subject as follows:

> "On this record, there appears to be no reasonable basis for the conclusion that control of B & O by C & O would seriously affect the ability of Central *or any other* carrier to provide adequate transportation to the public." 317 I.C.C. 284.

> "No other rail carrier will be placed at such a competitive disadvantage or otherwise unduly affected as a result of the transaction as to warrant disapproval. No other carrier has asked to be included in the transaction and there is no evidence of record showing that the public interest requires the inclusion of any other carrier." 317 I.C.C. 292.

> "Thus, we must estimate the scope and appraise the effects of curtailment of competition which will result from the proposed control and consider them along with the advantages of improved service, safer

operation, lower costs, et cetera, to determine whether the control *will assist in effectuating the overall transportation policy.* Suffice it to say that we have herein considered and discussed the referred to factors and we conclude that the control will assist in effectuating the overall transportation policy." 317 I.C.C. 292.

We hold that the Commission did give consideration to the effect of the affiliation on other railroads, that it made adequate findings on the subject and that such findings were supported by substantial evidence.[6]

Plaintiffs further attack the Commission's report by arguing that the Commission's report is fatally deficient in that it lacks adequate subsidiary findings. Section 8(b), of the Administrative Procedure Act, 5 U.S.C.A. §1007(b), provides that decisions of administrative tribunals shall include a statement of findings and conclusions, as well as the reasons or basis therefor, upon all material issues of fact, law, or discretion. This statutory provision requires subsidiary findings only upon those issues which are material, but not those which are collateral. *Minneapolis & St. Louis R. Co vs United States,* 361 U.S. 173, 193-194. To comply with this rule, it is enough if an administrative agency, such as the Interstate Commerce Commission, sets forth in its decision a reasonable review of the evidence before it, the weight which has been given to such evidence, its own resolution of the conflicts therein, and expresses its findings and conclusions necessary to support its ultimate findings. *Alabama Great Southern R. Co vs United States,* 340 U.S. 216, 227-228, 95 L. Ed. 225, 237; *Minneapolis & St. Louis R. Co vs United States,* 361 U.S. 173, 193. The findings expressed by the Commission

[6]Special caution was shown by the Commission in this regard by its imposition of "Conditions to insure the maintenance of existing routes and channels of trade" set forth in Appendix VII to its report. (317 I.C.C. 345) Such conditions are designed to prevent injury to other rail carriers, and by them the Commission retains jurisdiction to modify them, upon application, should need therefor arise.

in its report sufficiently exposed its view of the evidence and the basis upon which it came to its ultimate conclusion that the criteria essential to approval were present and established by the proofs made before it on its extended hearing. We are of the opinion that the findings it made were adequate to support its order.

2. *ADEQUACY OF INVESTIGATION AND HEARING*

The C & O's application to acquire control of the B & O initiated the involved proceeding.[7] The following parties, among others, intervened and participated in the proceedings, to wit: the United States Department of Justice, the states of Massachusetts, Michigan, New York, Ohio, the Maryland Port Authority, the New York Port Authority, cities such as Battle Creek, Michigan, Centralia, Ohio, Erie, Pennsylvania, Evansville, Indiana, and New York City, dozens of shippers, and the Chicago and Eastern Illinois Railroad, Boston & Maine Railroad, Pittsburgh & Lake Erie Railroad, New York Central Railroad, and the Railway Labor Executives Association. The Department of Justice was present at, and participated in, the hearing through representatives from the office of the Attorney General of the United States; the New York Central Railroad and Railway Labor Executives' Association, the latter a plaintiff here, were there by their counsel, all of whom took some part in the hearings, either before the Commission Examiner or the full Commission, or both. The Railway Labor Executives' Association represents all of the railroad brotherhoods of the operating railroads in the United States and, through these, substantially all of the railroad employees of the American railroads.

[7]The New York Central filed a rival application to acquire control of B & O or, in the alternative, to participate jointly with C & O in the control of B & O. This application was heard on a consolidated record with that of C & O. Central's application was withdrawn when its proposed merger with the Pennsylvania Railroad was announced.

It is contended here by plaintiffs that the Commission should have taken more evidence than it did; that it should have, on its own initiative, employed independent counsel, accountants and other experts, to investigate and to test the sufficiency of the evidence offered before it by the various parties. We should, initially, observe that no interested party was foreclosed from offering any evidence that it wished to offer. Railway Labor Executives' Association, intervenor there and here, offered the testimony of sixteen witnesses. No counsel present was denied the opportunity to cross-examine witnesses, and at no time during the hearing did any of the plaintiffs, or the Department of Justice, urge upon the Commission that it employ special counsel, accountants or other investigators to test the soundness of the evidence that was being offered by the railroads applying for its order of approval.

In their contention in this regard, plaintiffs properly assert that the Interstate Commerce Commission occupies a somewhat different position than the ordinary tribunal in that it is charged with the affirmative duty to look into and consider the interest of the public, and, in some measure, to thus be an advocate for the public interest. However, there is nothing in the statute requiring the Commission to actively promote opposition to applicants before it by hiring independent counsel or experts. A lack of confidence in the reliability and adequacy of the showing made before it may, indeed, prompt it to take such action. In this case, however, there were extended hearings with able adversaries exploring all facets of the issues involved; in addition to the Commission's own concern for it, the public interest was represented by the office of the Attorney General of the United States; the Commission found that the evidence supporting the application was of such quality, credibility and accuracy as to persuade it that the public interest would be served by ap-

proving such application. In this context, it can hardly be said that the Commission's discretion was abused in its failure to have undertaken, by counsel and experts employed by it, an adversary attack upon the case made before it. Its concern for the public interest does not require the Commission to employ a "devil's advocate" to attempt destruction of evidence which it finds adequate and reliable.

We are not sure that we understand plaintiffs' complaint, first made here, as to the Commission's failure to, itself, employ so-called independent counsel and other experts. Should we assume that such neutrals would have been more successful in exposing some invalidity in the C & O-B & O position than the impressive array of advocates who opposed the application? Is it thought that some special counsel would exhibit greater concern for, and employ greater ability to protect, the public interest than the Commissioners themselves, and other participants who stood watch over the proceedings?

3. *EFFECT OF CONTROL UPON EMPLOYEES*

Plaintiff, Brotherhood of Maintenance of Way Employees, and intervenor, Railway Labor Executives' Association, do not specifically attack that portion of the Commission's report which provides for the protection of the employees of the involved railroads as required by subsection (f) of Section 5(2), Title 49, U.S.C.A. The conditions imposed by the instant order were of broader scope than those imposed by the Commission in approving the merger of the Delaware-Lackawanna & Western railroad company with the Erie Railroad. The latter conditions were found sufficient in the case of *Brotherhood of Maintenance of Way Employees vs United States*, 189 F Supp 942 (E. D. Mich., 1960) affirmed 366 U.S. 169. The plaintiff

unions, however, attack the present order because of its claimed threatened injury to employees of the C & O and B & O, and to railroad employees generally. At the time of the filing of the complaint herein, plaintiff sought, and obtained, a restraining order which substantially prevents the displacement of any of the employees of the C & O and B & O pending this Court's determination of this cause. Such restraining order has continued in effect up to the present time.

Plaintiffs now contend that the Commission did not give adequate consideration to the interests of employees, and that the evidence adduced gives warning of such injurious effects on employees that the plan should be struck down by denying the application without reference to the sufficiency of attached employee-protection conditions. In this regard, we quote from the Commission's decision and findings concerning the effect of the sought for approval upon the railroad employees. After making various estimates as to the number of employees who would be displaced and the additional persons who would be employed, the Commission said:

> "Over the past decade, the financial condition of B & O has resulted in frequent and extended furloughs of many of its employees. Employment conditions on the C & O have been much better. In the long run, the C & O-B & O affiliation will undoutedly provide more job security. We realize, however, that consummation of the transaction will cause a substantial hardship to a number of employees and their families, and to some extent adversely affect business conditions in their communities. But we are not persuaded that the application should be denied for this reason. As a result of the affiliation, B & O's ability to render an efficient transportation service on a sound financial basis will unquestionably be strengthened. It is our opinion that the advantages that will accrue to

> the B & O, the C & O, and ultimately to the general public will far outweigh the adverse employee effects which the unification will entail. As we stated in the Southern Control case, 'it would not be in the public interest or compatible with the national transportation policy to deny the authority of Central's (Central of Georgia) facilities and the possible loss of jobs incidental thereto'. That statement is equally applicable here." 317 I.C.C. 285, 286.

It is observed that the merger of railroads and unification of their operation will inevitably entail some loss of employees' jobs, but the congressional policy recognizes that it is essential to saving our great transportation system that there be mergers and unifications to accomplish economies and the removal of duplication and unnecessary expense. The accomplishment of this purpose must inevitably have an impact upon the railroad employees. Recognition of this was what prompted Congress to require that no approval should be granted unless provision be made for protection of displaced employees. It is recognized that even though there will be some immediate hurt to railroad employees in the approval of mergers and affiliations, railroad employees, as well as all other members of the public, will, in the long run, find more and better opportunities if the country's total economic health is protected. We cannot say that the conditions imposed by the Commission do not adequately protect the rights of the employees in this situation.

4. *FAILURE TO CONSOLIDATE CONTROL WITH MERGER APPLICATIONS*

At the outset, we note that whether hearings should be consolidated is a matter committed to the discretion of the administrative agency. *American Trucking Association vs United States*, 326 U.S. 77, 83, 89 L. Ed. 2065, 2070;

Federal Communications Comm'n vs Pottsville Broadcasting Co, 309 U.S. 134, 138, 84 L. Ed. 656, 659. *Cf., United States vs Northern Pacific Ry.,* 288 U.S. 490, 501-502, 77 L. Ed. 914, 921. We are not persuaded that the Commission abused its discretion in this regard or that the public interest was jeoparized by the Commission's disposition of the C & O-B & O affiliation without waiting for the completion of the hearings on the merger applications pending before it, or by its refusal to consolidate all pending applications and to dispose of them in one decision. The Commission's decision exposes its reason for such exercise of discretion. It should be noted too that the C & O application was not for approval of a merger, as were the other proceedings with which it was asked to consolidate this case. The Commission said, "Before C & O and B & O can effect * * * a merger, another application must be filed with this Commission. Approval of the application for C & O to control B & O will not foreclose our opportunity to consider the lawfulness of such a future merger application, nor will it prevent interested parties from raising objections to proposals of that application when it is presented to the Commission for its approval." 317 I.C.C. 265.

The efforts of the plaintiffs here to set aside the Commission's order is bottomed primarily upon a contention that the problems of all the railroads in the northeast quadrant of the United States should be considered together. In our view, such a program would be but a return to a policy that, after long frustration, was found to be unwise, both by the studies made by the Commission and by the Congress of the United States. It cannot be denied that many years were consumed in laborious effort on the part of the Commission to come up with a plan for the re-arrangement of the entire railroad system of the country. At the end of this long period of study and ex-

perience, it was the conclusion of those trying to solve the problem that the best solution was to entertain applications initiated by the railroads themselves, and to allow them to attempt, by mergers and affiliations, to slow down and arrest the economic deterioration of the American railroads.

The evidence in this case shows that the B & O, one of the very great railroad systems of the United States, is in critical condition. We think that it would be a disservice to the national policy to hazard the exposing of this railroad to continuing crises by postponing the help that appears to be available to it in the control proposal of the C & O. We cannot predict at this time how many months or years would be consumed in trying to find the perfect, or merely a better, solution of the problems of our eastern railroads, large and small. As stated by Justice Jackson, reviewing the failure of a nationwide plan, "waiting for the perfect official plan was defeating or postponing less ambitious but more attainable voluntary improvements." *Schwabacher vs United States, supra,* 334 U.S. at p. 193. The Commission is satisfied that the approval of the application before it involving the C & O and B & O will be a definite step forward in solving this great national problem. We are not persuaded that the Commission is wrong. In all events, it is not our function to substitute our judgment for that of the Commission. *Minneapolis & St. Louis R. Co vs United States,* 361 U.S. 173, 188. The Commission's wisdom and experience, not ours, must determine whether its approval of the C & O-B & O affiliation is consistent with the public interest. *McLean Trucking Co vs United States,* 321 U.S. 67, 87.

We are satisfied that the Commission committed no errors of law, that its action was not arbitrary, capricious or an abuse of discretion. We cannot say that its

findings of fact are unsupported by substantial evidence on the whole record. While not controlling, we think it significant that no railroad has joined the plaintiffs, intervenors, or the Attorney General in this litigation. If Commission approval of the C & O control of B & O were prejudicial to the interests of other railroads, we might, indeed, expect the self interest of such other railroads, or groups of railroads, to urge them to join in the attack on it.

An order dismissing the complaint and dissolving the temporary restraining order may be presented for signature.

Dated August 7th, 1963.

/s/ Clifford O'Sullivan
Circuit Judge

/s/ Thomas P. Thornton
District Judge

/s/ Stephen J. Roth
District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, Plaintiff,	
RAILWAY LABOR EXECUTIVES' ASS'N., Intervenor Plaintiff,	
BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, THE INTERNATIONAL ASS'N OF MACHINISTS, AND THE BROTHERHOOD OF RAILWAY CARMEN OF AMERICA, Intervenor Plaintiffs,	Civil Action No. 23,467
vs.	
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants,	
BALTIMORE & OHIO RAILROAD COMPANY, Intervenor Defendant,	
CHESAPEAKE & OHIO RAILWAY COMPANY, Intervenor Defendant.	

FINAL JUDGMENT AND DECREE

The above-entitled action having come on for hearing on May 21, 1963, before this Court, constituted as a three-judge district court under section 2284 of the Judicial Code, 28 U.S.C. §2284, and this Court, on August 13, 1963, having filed its opinion, sustaining the assailed order of the defendant, Interstate Commerce Commission, it is hereby

ORDERED, ADJUDGED AND DECREED that the relief prayed for in the complaints be denied and that the complaints be dismissed, and it is hereby

FURTHER ORDERED, ADJUDGED AND DECREED that, upon consent of the parties and pursuant to Rule 62(c) of the Rules of Civil Procedure, the terms of the temporary restraining order previously entered by this Court, Judge Thomas P. Thornton, on February 1, 1963, shall be continued in full force and effect pending disposition of an appeal by the plaintiffs to the Supreme Court of the United States, conditioned upon plaintiffs' docketing such appeal on or before October 1, 1963.

This the 23rd day of August, 1963.

/s/ CLIFFORD O'SULLIVAN
Clifford O'Sullivan
United States Circuit Judge

/s/ THOMAS P. THORNTON
Thomas P. Thornton
United States District Judge

/s/ STEPHEN J. ROTH
Stephen J. Roth
United States District Judge

Approved as to form:

/s/ William J. Mahoney
William J. Mahoney
for Brotherhood of Maintenance of
Way Employees and Intervening
Plaintiff Railway Labor Executives'
Association

/s/ Charles S. Rhyne
Charles S. Rhyne
for Intervening Plaintiffs
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, The International Association of Machinists, and the Brotherhood of Railway Carmen of America

/s/ Robert W. Ginnane
Robert W. Ginnane
for Interstate Commerce Commission

/s/ Lionel Kestenbaum
Lionel Kestenbaum
for United States Department of Justice

/s/ Edward K. Wheeler
Edward K. Wheeler
for the Chesapeake & Ohio Railway Company

/s/ Kenneth H. Ekin
Kenneth H. Ekin
for the Baltimore & Ohio Railroad Company

APPENDIX C

I. PERTINENT PROVISIONS OF ADMINISTRATIVE PROCEDURE ACT

"Title 5, U. S. Code:

"§ 1007. INITIAL DECISIONS; CONCLUSIVENESS; REVIEW BY AGENCY; SUBMISSIONS BY PARTIES; CONTENTS OF DECISIONS; RECORD

"In cases in which a hearing is required to be conducted in conformity with section 1006 of this title —

"(a) In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to sub-section (c) of section 1004 of this title, any other officer or officers qualified to preside at hearings pursuant to section 1006 of this title) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

"(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommend decisions of subordinate officers or to tentaive agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

* * *

"§ 1009. JUDICIAL REVIEW OF AGENCY ACTION

* * *

"Scope of review

"(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by sub-

stantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

II. PERTINENT PROVISIONS OF INTERSTATE COMMERCE ACT

"Titile 49, U. S. Code:

"§ 5. COMBINATIONS AND CONSOLIDATIONS OF CARRIERS

"(2) Unifications, mergers, and acquisitions of control

• • •

"(b) Whenever a transaction is proposed under subdivision (a) of this paragragh, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the

Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragragh and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

"(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transctaion; and (4) the interest of the carrier employees affected."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, THE INTERNATIONAL ASSOCIATION OF MACHINISTS, and THE BROTHERHOOD OF RAILWAY CARMEN OF AMERICA, *Appellants*,

v.

INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

JURISDICTIONAL STATEMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No.

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, ET AL., *Appellants*,

v.

INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

JURISDICTIONAL STATEMENT

This is an appeal by intervening Plaintiffs, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, International Association of Machinists, and Brotherhood of Railway Carmen of America, from a Judgment affirming an order of the Interstate Commerce Commission (ICC) entered August 23, 1963, in accordance with an Opinion of the District Court of the United States for the Eastern District of Michigan, as a three-judge statutory Court specially invoked by virtue of the provisions of 28 U.S.C. § 2325. This is a class

action and in said class in addition to the above named intervenors and the original Plaintiff herein the Brotherhood of Maintenance of Way Employees are included the following: Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen & Enginemen, Brotherhood of Railroad Trainmen and the Order of Railway Telegraphers. This Statement is submitted by Appellants to show that the Supreme Court of the United States has jurisdiction of the appeal and that questions of substantial importance are presented.

Opinions Below

The Opinion of the District Court of the United States for the Eastern District of Michigan is attached to this Jurisdictional Statement as Appendix A, *infra*, at page 25. The judgment of the District Court is attached to this Statement as Appendix B, *infra*, page 44. The order and Opinion of the majority of the ICC and the dissenting opinions are attached to this Statement as Appendix C, *infra*, at page 46.

Jurisdiction

Appellants complaint sought to annul, set aside and enjoin an Order of the ICC issued December 17, 1962, ICC Finance Docket No. 21160. This action was brought under the Interstate Commerce Act (49 USC §§5(2), 17(11)), the Administrative Procedure Act (5 USC §1006), and the Due Process clause of the Constitution of the United States.

The Opinion of the District Court was rendered on August 13, 1963, and its Order was entered on August 23, 1963. Notice of Appeal was filed on September 11, 1963. Jurisdiction to review this decision by direct appeal is conferred by 28 USC § 1253. The following decisions sustain jurisdiction to review: *Interstate Commerce Commission* v.

Hoboken Manufacturers' R. Co., 320 U.S. 368; *McLean Trucking Co.* v. *U.S.*, 321 U.S. 67; *Burlington Truck Lines* v. *U.S.*, 371 U.S. 156.

Questions Presented

I. Whether refusal of the ICC to consolidate for joint consideration interrelated merger applications of other railroads in the same territory violated statutory mandates and Due Process requirements.

II. Whether the ICC failed to determine and give consideration to "public interest" factors as required by the Interstate Commerce Act when it acted solely as a judge of evidence chosen by the litigants without performing its affirmative duty of ascertaining whether all essential facts were before it?

III. Whether the ICC violated statutory and due process standards by the limited type of hearing ordered in this case?

IV. Whether the public interest standard of the Interstate Commerce Act as interpreted and administered by the ICC in this case constitutes an invalid uncontrollable delegation of legislative power?

Statutes Involved

Applicable provisions of the Interstate Commerce Act, 49 U.S.C. 5, et seq., are set forth in Appendix D, *infra* at page 47. Applicable provisions of the Administrative Procedure Act, 5 U.S.C. §§ 1006, 1007 and 1009 appear in Appendix E, *infra* at page 50. The provisions of 28 U.S.C. §§ 1253, 1336, 2321-2325 are set forth in the Appendix F, *infra* at page 55.

Statement

This action seeks reversal of a Judgment affirming an Order of the Interstate Commerce Commission authorizing the Chesapeake and Ohio Railroad Company (C&O) to acquire control of the Baltimore and Ohio Railroad Company (B&O). Reversal is sought on the grounds that the order was adopted in violation of the Due Process Clause, the Interstate Commerce Act and the Administrative Procedure Act. The United States of America, a statutory defendant, confessed that the Interstate Commerce Commission's Order is erroneous because of its failure to consider the effect of approval of consolidation in this case upon other railroads and other modes of transportation as the Interstate Commerce Act specifically requires. 49 U.S.C. preamble, §5(2)(c)(2).

Appellants are duly designated collective bargaining representatives for employees of the C&O, the B&O, and similar employees of other railroads throughout the United States under the Railway Labor Act. These employees are all directly or indirectly affected as to job rights and working conditions by the ICC Order.

By applications filed on June 14, 1960, before the ICC, C&O sought authority to acquire control of B&O through acquisition of its capital stock. Appellants through the Railway Labor Executives' Association (Association) intervened and participated in the proceedings. New York Central (Central) also filed an application to acquire control of the B&O. Central's application was consolidated and heard with that of C&O. After the close of the hearing and the filing of its application to merge with Pennsylvania Railroad Company (Pennsylvania), Central which had lost interest was permitted to withdraw its application. Central filed no brief.

Motions were filed requesting ICC to consolidate for joint consideration the C&O applications with the pending merger applications of Norfolk and Western Railway Company (N&W) and the New York, Chicago and St. Louis Railroad Company (Nickel Plate), Wabash, and the Pennsylvania-Central application. The basis for these Motions was that the proceedings are interdependent, the service involved is inextricably intertwined, and the ICC is required by statute to find whether there will be adverse effects on other carriers before approving any merger or control consolidation. These Motions were supported by the Association and the United States Department of Justice. ICC denied these Motions in its Decision and Order.

This action was then brought to set aside the ICC order or in the alternative to obtain an order requiring joint consideration of the merger applications. The Railway Labor Executives Association, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, International Association of Machinists, and the Brotherhood of Railway Carmen of America were allowed to intervene as plaintiffs. The C&O and the B&O were permitted to intervene as defendants.

The District Court held that the ICC has provided a proper hearing, made the required findings, and the Order is valid. The basic premise which the Court stated for upholding the ICC's order was that if the railroads are to survive consolidations are essential (App. A, p. 27). The Court rejected Appellants' position that ICC has affirmative statutory duties to perform beyond the duty of sitting as a judge upon the evidence presented by the litigants and the Court claims Congress approved ICC's case-by-case handling of mergers when Congress rejected temporary moratorium legislation on mergers (App. A, p. 28). As to joint consideration on merger applications of

other railroads in the B&O-C&O territory then pending before it, with that of C&O, the Court held that this was a discretionary matter and denied relief.

The Questions Presented Herein Are Substantial

A. *The National Interest and Consequences*

Because it vitally affects all railroads and railroad employees and, in fact, all Americans who depend on rail service, this case involves one of the most important decisions yet made by ICC in its 75 years of existence. Far reaching consequences affecting not only the future of the railroad industry but the future of an adequate transportation service for our Nation are involved. Without adequate transportation service, essential growth and expansion of the national economy is impossible of achievement. Possible disastrous effects on the national economy are present.

It is vital to the future economic well-being of the United States that the railroad industry provide adequate, safe, and reliable service, and that it be competitive, progressive and strong. The ICC is charged by statute with the duty of promoting this service in the public interest. Its failure to adapt and follow procedures which would enable ICC to discharge this statutory duty is the issue here.

This case is the first of the veritable flood of recent consolidation and merger applications directly involving 70 per cent of the Nation's railroad service and actually affecting 100 per cent of such service. This case is in fact the first step in an irreversible process of consolidation, integration and merger of railroads in the Official Territory (northeast quadrant) of the Nation into three giant systems embracing over 80 per cent of the trackage and 90 per cent of the rail freight in the region. The railroads in the

balance of the Nation are also in a headlong race to consolidate or merge.

Approval of this control application triggers events affecting the many pending and related applications. Now is the time, the only time, when basic statutory principles can be properly applied in this and interrelated cases as required by applicable statutory provisions.

Yet despite this critical posture which clothes this case with unique and overwhelming public importance, this Court is here faced with a fundamental breakdown in the administrative process. In the nature of the hearing provided, in its pedestrian treatment of the issues involved, and in its failure to acquire and consider the facts on mandatory public interest factors, the ICC has ignored and refused to comply with essential statutory and due process requirements in arriving at its decision.

As a prerequisite to approving the C&O application, the ICC was required to determine that the proposed transaction is "just and reasonable" and "consistent with the public interest." 49 U.S.C. § 5(2)(b). ICC is also expressly charged by this statute with the duty of promoting an adequate national transportation service. Yet in this case ICC failed to perform its statutory duty and claims that the performance of that duty is up to the litigants on a case-by-case basis. ICC made no independent investigation of the facts showing the impact of the applications in this case on other railroads, affected but not parties, on other modes of transportation or on the public needs for rail service. No evidence on those mandatory statutory requirements was presented. A large empty void thus exists in the record. And ICC did this even though it knew the litigants before it did not have the finances, experience or knowledge to perform ICC's statutory duty.

Private litigants do not have the responsibility of exploring and determining public interest standards. ICC does. But here the ICC took what the private litigants brought before it, i.e., their complaints about the effects on their special interests and equated these shifting special interests with the public interest. This approach by the ICC to the great issues involved here left unexplored and unconsidered the mandatory public interest criteria which the Interstate Commerce Act requires the ICC to consider in passing upon merger and consolidation applications. The shocking refusal of ICC to perform its statutory duty is clear. Unless ordered by this Court to perform that duty it is obvious that compliance by ICC will never occur.

Many administrative agencies have regulatory duties involving interpretation and application of the "public interest" standard. These agencies, (*except the Interstate Commerce Commission.*) have set up divisions or staffs whose duty it is to collect the facts and put them into the public record of each case. Agency staff and other expert evidence and recommendations are presented in every case of any consequence. But the ICC has steadfastly declined to change its procedures or to appoint public counsel, even though expressly authorized by statute to do so (49 U.S.C. § 16(11)). ICC decides cases—as it did here—on incomplete records rather than follow the "on-the-record" dictates of this Court, *Morgan v. United States*, 298 U.S. 468, 481; 304 U.S. 1, 16-22, as codified into the Administrative Procedure Act (APA). 5 U.S.C. §1005(c), 1007(d), 1008.

In ultimate thrust, this case involves two great obsessions against change which are strangling railroad service in our Nation: (1) That of ICC against modernization of its procedures to meet current and future public needs;

(2) that of the railroads against modernization of their performance to meet current and future public needs. Due to this policy against modernization, both agency and monopolistic industry are failing to render the public service imposed by law.

Nothing less than a decision by this Court can force ICC to change its out-dated procedures and adopt and apply the new—for ICC, at least—processes and procedures which are required for a fair decision in the instant control case and those related and similar merger cases now pending before it. Now is the time to do this before the "closed-narrow-mind," "piecemeal," "use-only-that-which-the-litigants-produce" concept of ICC cripples and ruins the railroad industry of the United States so that this great industry will no longer be able to meet the needs of our Country's commerce, postal service, and national defense. In other instances where administrative agencies have failed to perform their statutory duties this Court has not hesitated to order that duty performed. Such an order is called for here.

The Administrative Procedure Act applies to the ICC. *Minneapolis and St. L.R. Co.* v. *United States*, 361 U.S. 173, 192; *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167. Yet the ICC dislikes that Act, was and is its chief opponent, and even now stubbornly refuses to revamp and adjust its ancient and antiquated procedures so that they are in keeping with the requirements of due process as laid down by this Court and codified into the APA. No case illustrates better the grave, adverse results of this ICC policy upon public and private interests.

Time after time this Court has scrutinized administrative agencies, their tasks and procedures, to determine whether the basic fundamental requirements of a fair hearing have been met. In landmark cases such as *Morgan* v.

United States, 298 U.S. 468; 304 U.S. 1; *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474; *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327; and *FCC* v. *RCA Communications*, 345 U.S. 86; *Burlington Truck Lines* v. *ICC*, 371 U.S. 156, this Court found that basic fundamental principles were not followed and that agency action must therefore be set aside. This is another landmark case requiring re-examination of fundamentals and a determination of what due process and applicable statutory provisions require in the extraordinary and unprecedented circumstances here present.

This Court has never had before it for review in any other case the full nature and extent of ICC's statutory duties in protecting the public interest in the context of related and simultaneous nation-wide railroad mergers. The issues herein are therefore new, important and substantial.

B. *ICC's "Closed Mind"—Narrow Interpretation Aborts Its Statutory Duties*

(1) *Refusal To Consolidate Interrelated Applications*

Section 5(2)(c)(2) of the Interstate Commerce Act requires that before approving control of one railroad by another, the ICC must determine "the effect upon the public interest of the inclusion, or failure to include other railroads in the territory involved in the proposed transaction."

As a compliance with this mandate, ICC was asked to give the instant application joint consideration with the merger applications of the New York Central, Pennsylvania, Norfolk & Western, Nickel Plate, and Wabash Railroads. All are in the "territory involved" in the proposed control transaction of the C&O and the B&O. These railroads "involved" in the territory of the C&O-B&O are

not just railroads operating as single entities. They are railroads which are now in the process of merging into entities of different operating dimensions and powers. Therefore, the Commission in finding the effect on these railroads and other railroads must consider them as railroads in an active state of merger transformation. The Commission under its statutory mandate cannot blind itself by its own procedures and prêtend the railroads are merely in operation as single units and ignore the applications for merger because they are before it in separate dockets. The evidence there developed as to what the mergers will mean must be considered to meet the statutory requirement. But here the ICC refused to consider that evidence—a direct statutory violation—a violation which the United States emphasizes by its confession of error.

Since the ICC refused to consider jointly the evidence on the railroad consolidations in the same "territory," the Commission made it impossible for itself to perform its statutory duty. The Commission cannot possibly be presumed to have made conclusions about matters which by its own order it refused to consider.

There is no evidence whatever in the record to support ICC's finding in denying joint consideration that:

> "Consolidation of the proceedings with the two proceedings . . . would result in delay that would cause immediate serious injury to B&O and ultimately to the general public". (App. C, p. 265)

In addition to these flagrant statutory violations, there is also a denial of due process by the pre-determination in this proceeding of other railroad merger applications in process for the Official Territory (Northeastern region) of the Nation. And the Appellants are parties to these other proceedings. Consolidation of C&O and B&O creates

a condition of such imbalance among the competing railroad systems in the East that an overwhelming compulsion exists for the ICC to approve the other merger applications now pending of the New York Central, Pennsylvania, Nickel Plate, Norfolk & Western and Wabash. Naturally, this is what the involved railroads desire. The failure of other railroads to intervene in these cases even when their immediate self-interest might seem to be hurt, is easily explained by their desire to themselves participate in future mergers. Expectation of the setting off of a chain reaction of more mergers by approval of this one accounts for the "reciprocity of silence" (App. C, Dissent, p. 326) from the railroads.

This Court has laid down the fundamental rule that procedural fairness requires a joint consideration of applications if a decision in one would effectively prejudge the decision in the other. *Ashbacker Radio Co.* v. *FCC*, 326 U.S. 327. In approving the C&O-B&O application but refusing joint consideration with the Pennsylvania-Central and the N&W-Nickel Plate-Wabash applications, the ICC flouts this rule of fundamental due process fairness.

(2) *ICC's Order That Its Statutory Duties Be Performed By Private Litigants—Or Not Performed At All—Resulted In An Unfair Hearing.*

When approving consolidation of carriers, the Congress has charged ICC with the statutory duty of finding that the application is "consistent with the public interest". 49 U.S.C. § 5(2)(b). It has also provided that weight be given to (1) the effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include other railroads in the territory involved; (3) the total fixed charges resulting from the proposed transaction; and (4) the in-

terest of the carrier employes affected. 49 U.S.C. § 5(2)(c). The Preamble to 49 U.S.C. sets forth the ICC's duty in all actions to promote and develop an adequate national transportation system for the United States.

The major protection which Appellants have under the Interstate Commerce Act is in the performance by ICC of its statutory duty to protect the public interest. Yet, ICC abandoned its statutory duty to protect the public interest in this case to the private litigants before it. Instead of collecting and presenting the facts in the record as to public interest criteria ICC assumed for itself the role merely of a judge in a Court and rejected the affirmative quasi-legislative investigatory role which Congress obviously envisioned in the statutory duties it precribed for ICC in cases such as this one.

This limited view of ICC's statutory duty and this abandonment is clear from the very nature of the hearing ICC ordered on the applications herein. In the face of the acknowledged unprecedented revolutionary merger movement of which the instant case is the key, the hearing ordered was a routine adversary proceeding in which ICC would consider only evidence chosen by any private litigants who cared to intervene and make its decision on that basis. The ICC hearing order made no provision for an independent investigation of the impact of these applications on the public interest, including shippers, consumers, cities, rail and other transportation service and the other factors set forth by Congess in ICC's statutory duties.

It is an unfair burden, constituting a denial of due process, that ICC herein has tried to cast upon the private litigants its own far-reaching statutory duties in this important and complex case. For those litigants have neither the resources nor expertise to perform the duty Congress placed upon ICC and for the performance of which Con-

gress gave ICC money for manpower. When New York Central, the only litigant with immediate broad interests suddenly withdrew its opposition in order to participate in a consequential merger, the hearing, and in effect the record, collapsed even as an adversary proceeding. The applications herein were thus granted almost by default. ICC either should have or did anticipate such an event and such a one-sided record.

The District Court finds an excuse for ICC's failure to perform its statutory duty in the large number of lawyers representing special interests who appeared before ICC in this case. But with all due respect, the magnitude of these private interests merely proves how important it is in this case that the public interest be represented by ICC as the statute requires. The loss of interest by New York Central, its withdrawal, and its failure to file a brief marshalling its evidence, took away the force of that evidence. Even in the face of this, ICC itself had neither a witness nor a lawyer who appeared in the proceedings before it to present facts relative to the public interest.

It is inconceivable that such an abortive proceeding is the type of protection of the "public interest" which the Congress laid down as ICC's statutory duty. The District Court erroneously looks upon the failure of the Congress to adopt a moratorium against mergers as an approval of ICC's "case-by-case approach to the merger problem", (App. A, p. 28). Congress did not need to relegislate the duties stated at the outset of this section to make them controlling on ICC. It had already spelled them out, and ICC must perform them to render its order valid.

The Interstate Commerce Act, 49 U.S.C. § 16(11), specifically provides for the employment of attorneys by ICC for "proper representation of the public interest" in cases pending before it. Specific power to investigate matters

involved in the performance of its statutory duties is also conferred. 49 U.S.C. § 13. Congress obviously intended that in cases of great national importance the ICC should make a "proper representation of the public interest" in the record of each proceeding before it. ICC must develop the record with all proper "public interest" considerations, and put into the record facts and expert opinion to further enhance the expertise of the Commission to enable it to base its ruling on the record as required by the decisions of this Court and the Administrative Procedure Act. The District Court rejected this statutory function as an attempt to turn ICC into a "devil's advocate". (App. A, p. 38.) It is respectfully urged that advocating the public interest is hardly such a representation. The ICC's position is that in consolidation cases its duties are identical with those of a court judge but clearly this is not what Congress envisioned in the statutory duties it laid upon ICC. Other administrative agencies with like statutory duties do not so envision their duties. The Department of Commerce, Federal Maritime Board, Civil Aeronautics Board, Federal Communications Commission and the Federal Power Commission, which also have regulatory duties involving interpretation and application of the "public interest" standard have attorneys and staff and experts putting into the records of their cases the facts that relate to the public interest criteria upon which they must decide.

The answer to ICC's present "above the battle" policy is found in ICC's stubborn opposition to the Administrative Procedure Act.

Prior to the Administrative Procedure Act the ICC rendered what has been labeled an "institutional decision." ICC called in its experts and used their "off the record" facts and opinions as the basis of its decisions. But the *Morgan* and other decisions of this Court (see *supra*, p. 9-10)

held that such a procedure is a violation of fundamental fairness inherent in due process requirements, and that an administrative agency must put everything it considers in its decision into the public record before it. ICC vigorously opposed this idea of the APA and with the adoption of APA and its prohibitions ICC abandoned the consultation of its expert staff in adversary proceedings. The staff provided by the Congress is still there. But it is not used. See *Railroad Consolidations and the Public Interest* (1962), Staff Study of the Bureau of Transport Economics and Statutes of the ICC.

Failure of ICC to develop and consider a record which adequately investigates and presents the facts on the mandatory "public interest" factors set forth in the Interstate Commerce Act requires reversal of this case. ICC has neither acquired nor used the expertise specified by the statute for decision of this case. See *FCC* v. *RCA Communications*, 346 U.S. 86, 91; *Texas Gas Trans. Corp.* v. *Shell Oil Co.*, 363 U.S. 263, 270.

While the ICC has power to determine its own procedure (49 U.S.C. § 17(3)) that procedure must be adequate for the task to be performed. By any yardstick of measurement ICC's procedure in this case must be found wanting. As in the *Morgan* v. *United States*, 298 U.S. 468; 304 U.S. 1, and other cases discussed herein, this Court must order that ICC re-do its job here in conformity with statutory and due process requirements. The "public interest" and the overwhelming national need so require.

C. *The ICC's Findings Fail to Meet Statutory Requirements*

The ICC majority's findings in this proceeding are wholly inadequate to support its Order. They violate the Interstate Commerce Act (49 U.S.C. § 5(2)(b)(c)), the National

Transportation Policy (Preamble to 49 U.S.C.), the Administrative Procedure Act (5 U.S.C. § 1007(b)), and ignore the rulings laid down in decisions of this Court under similar circumstances.

In this case, it is essential that public interest factors be specifically identified and specifically considered by the ICC so that this Court may determine whether the ICC has performed its statutory duty. The ICC majority did no such thing. It did not even deign to list the factors it considered as making up the "public interest," criteria much less weigh the evidence of record against such criteria. The District Court at the very outset of its opinion assumed that "if the railroads of this Country are to survive . . . mergers . . . will have to take place." (*Infra* page 27) It is obvious that this conclusion permeates the District Court's reasoning and ICC's decision to such an extent as to create a prejudice in favor of railroad mergers. The findings reflect this.

The performance of ICC's statutory duty as to findings can be tested by a review of its action on three i.e., (1) diversion of traffic, (2) monopoly, and (3) B&O's financial condition.

(1) *"Undue" Diversion Of Traffic*

The Interstate Commerce Act provides that in passing upon acquisition of control and merger applications ICC must consider: "the effect of the proposed transaction upon adequate transportation service to the public" 49 USC § 5(2)(c)(1) and the effect upon . . . other railroads." 49 U.S.C. § 5(2)(c)(2). The ICC purports to satisfy these and other statutory and decisional requirements by a recitation of ultimate findings or conclusions. However, before the ICC can justify such sweeping conclusions, as for example, that there is no "undue" diver-

sion of traffic from other railroads, ICC must first find what amount of diversion is "undue" and then make a finding as to the amount that might reasonably be expected in this case. This ICC does not do.

The impact of the Commission's approval of the C&O-B&O application has the potential of presenting catastrophic diversion results to other railroads. Central, in testimony presented before its withdrawal, estimated that the C&O-B&O consolidation will divert 41 per cent of its traffic. Central's evidence was that almost any degree of traffic diversion could spell the demise of Central, but the ICC did not make a finding as to how much diversion would result from its order.

On diversion the finding made by the ICC majority states:

> ". . . it does not appear that there will be any undue diversion of traffic from Central by reason of the C&O-B&O affiliation or that any rail carrier will be unduly injured." (App. C, P. 265)

As Commissioner Tucker said in his dissent, the Commission's "cavalier" treatment of his crucial finding flies in the face of this Court's decisions requiring more than a mere conclusory statement (App. C, P. 319). *United States v. Pierce Auto Lines*, 327 U.S. 515, 533; *Florida v. United States*, 282 U.S. 194, 215. He points out that "undue" is a "meaningless generalization" when the ICC majority does not say whether 1 or 20 per cent is "undue" in this case. (P. 319, App. C.)

The only railroad which the majority even mentions is the New York Central. The other affected railroads are simply lumped together as "other rail carriers." Specific attention should have been directed to, and individual find-

ings reached, as to the effect of the C&O control of B&O upon the Pennsylvania, Norfolk & Western and all other railroads affected directly or indirectly. Especially is this true as to the short line and branch line or smaller railroads not within the three great empires into which the East is being carved. This the Commission failed to do.

The Commission failed altogether to determine the effects of possible traffic diversion from modes of transportation other than rail. This is another basis of the United States confession of ICC statutory error already cited herein.

(2) *Monopoly And Anti-Trust Factors*

Proper consideration is not given, nor are proper findings made, with respect to the monopoly effects that C&O control of the B&O would have on other rail carriers or on other modes of transportation. Yet this is required by the applicable statutory provisions as even the ICC majority recognizes (App. C, p. 292). Especially is this true where the obvious result of ICC's order herein appears to be an ultimate three-way oligarchial division of all railroad service in Official Territory (Eastern United States). *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 86-88.

It is quite obvious that the Commission completely "swept under the rug" any consideration of the monopoly and competitive effects of the proposed transaction upon modes of transportation *other than rail*. Even the alleged finding on rail "monopoly," i.e.,

> "No other rail carrier will be placed at such a competitive disadvantage or otherwise unduly affected as a result of this transaction as to warrant disapproval." (p. 292)

is totally unsupported by required subsidiary findings and for that matter unsupported by any evidence in this incomplete record. *Burlington Truck Lines* v. *ICC*, 371 U.S. 156, 167-168.

ICC must be ordered to perform its statutory duty by developing a proper record and making proper findings based thereon as to monopoly and competitive effects of the B&O-C&O consolidation.

(3) *The Order Is Not In The Public Interest Because Based On A Major Error Of Fact As To B&O's Financial Condition.*

The alleged finding of the ICC majority which best demonstrates that ICC's Order of Consolidation is wrong factually, as well as legally, is the major finding that B&O's financial and physical condition require said Order approving control. The Order assumes that given control, C&O will help B&O, but no such commitment is made by C&O or required by ICC's order. The Order leaves the public interest in B&O's continued service at the mercy of C&O. Without any evidence in the record to support such an assumption of C&O help to B&O, the Order is clearly wrong. The Order really allows C&O an option to make B&O into an operating partner or to use B&O to enhance C&O's own financial position and operating economies. All of this is made clear in the Dissent of Commissioner Tucker (pp. 309, 311 et seq. and compare p. 280 of majority opinion).

The record makes it abundantly clear that the B&O's financial condition alone did not warrant the brushing aside of other public interest factors and the rapidity with which the Commission "pushed through" the control application. It is beyond dispute that in 1962 B&O operated

"in the black." (*Ibid*, p. 302) And that 1963 will be a profitable year. The results of ICC's failure to perform its statutory duty to develop the facts on B&O finances as a basis for correct findings is thus directly illustrated.

The fact is that the Commission flagrantly ignored the sum total of the benefits and injuries of this application as applied to the public interest. Commissioner Tucker, in his dissent to the Commission's Order, sums up best the problem now confronting this Court as follows:

> "Inasmuch as we are now being called upon to decide the fate of the whole eastern railroad network, it seems only reasonable that we make a great effort to fully comprehend the overall results of our action with respect to the separate proposals. Although individual railroads have the right to put all their eggs in one basket and to hope that our approval will increase the necessity for another, this Commission, as guardian in this area of public interest, must not neglect to consider the possible disastrous results to the public of this action." (Dissent at p. 330, App. C)

Commissioner Tucker also correctly summarizes the ICC's primary function as follows:

> "It is the primary responsibility of the Commission, however, to preserve the development of a sound transportation system in the public interest, and where an application may offer the possibilities of public injury, the Commission must strive to obtain a record which comprehensively covers public considerations.
>
> "Our status as a quasi-judicial body does not compel this Commission to make decisions based solely on the narrow interests of the private parties as exemplified

by their testimony before this Commission." (p. 326, App. C.)

The very magnitude of the Commission's task in this case emphasizes the necessity that it make adequate findings and spell out with clarity the essential facts upon which its decision rests.

Recently in *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167-168, this Court stated:

> "The Commission must exercise its discretion . . . within the bounds expressed by the statutory standard of 'public convenience and necessity' . . . . And for the courts to determine whether the agency has done so, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it'. . . . The agency must make findings that support its decision, and those findings must be supported by substantial evidence . . . and articulate any rational connection between the facts found and the choice made . . ."

Since the Commission failed in its duty to make adequate findings to support its Order, the Commission's Order should be reversed.

D. *The "Public Interest" Standard as Interpreted and Administered by ICC Constitutes an Invalid Delegation of Unlimited Legislative Power.*

This Court early recognized that a statute may be valid on its face, but administered in such a way as to constitute a denial of due process and equal protection of the laws. *Yick Wo* v. *Hopkins*, 118 U.S. 356. The "public interest" standard as interpreted and applied by the ICC herein

frees ICC from any function except to decide on the basis of whatever the litigants present to it. This interpretation of its statutory duties frees ICC from any responsibility to develop the facts on public interest criteria so that the ICC will have the full picture before it in making its decision. The ICC has interpreted its statutory duties so narrowly as to emasculate them, especially as they constitute mandatory requirements. Instead of implementing its statutory mandates as to public interest standards the ICC has ordered a narrow hearing limited to the self-interest of litigants, without any reference to other intimately related mergers, to transportation in general, and to the long-range needs of the nation's commerce, postal service or the national defense. In *Burlington Truck Lines* v. *United States*, 371 U.S. 156 at p. 167, this Court stated that:

> "Expert discretion is the life blood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion. . . ."

ICC has no power to thus free itself from statutory restrictions and due process requirements by an erroneous interpretation of its statutory powers—an interpretation allowing it to pick and choose any criteria it wants to pick to fit the narrow record before it. Assumption of such unlimited powers by ICC frees it of statutory duties laid down by the Congress.

In the instant proceedings, the ICC acted beyond the scope of its authority in not developing and considering on the record the "public interest" factors as they relate to the B&O-C&O application. The Commission's action is

a rewriting of the Interstate Commerce Act by deleting those factors as limitations upon its power.

It is earnestly contended that such an assumption of power by ICC to enact such a revision of mandatory statutory provisions constitutes an assumption of an invalid delegation of legislative power. *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495; *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 421. This unbridling of itself is an assumption of unlimited power which is in conflict both with statutory mandates and the due process clause. Here as in *FCC* v. *RCA Communications*, 346 U.S. 66, 90: "Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body."

Conclusion

It is submitted that the Court has jurisdiction and should hear this appeal because of its tremendous consequences on the Nation as a whole. The ICC has violated the Interstate Commerce Act, the Administrative Procedure Act and the due process standards guaranteed by the United States Constitution. Such violations require reversal.

Respectfully submitted,

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APPENDIX A—Opinion of the District Court

Filed U. S. District Court East. Dist. Mich. August 13, 2:30 PM '63. Julius L. Kabatsky, Clerk

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

No. 23,467

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, *Plaintiff*,

RAILWAY LABOR EXECUTIVES' ASS'N., *Intervenor Plaintiff*,

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, THE INTERNATIONAL ASS'N OF MACHINISTS, AND THE BROTHERHOOD OF RAILWAY CARMEN OF AMERICA, *Intervenor Plaintiffs*,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Defendants*,

BALTIMORE & OHIO RAILROAD COMPANY, *Intervenor Defendant*,

CHESAPEAKE & OHIO RAILWAY COMPANY, *Intervenor Defendant*.

Before O'SULLIVAN, Circuit Judge, THORNTON and ROTH, District Judges.

O'SULLIVAN, Circuit Judge. This statutory three-judge court was convened upon the filing of a complaint by the Brotherhood of Maintenance of Way Employees against the United States and the Interstate Commerce Commission. 28 U.S.C.A. §§ 1336, 1398, 2284 and 2321-2325. The complaint attacks the validity and sufficiency of the report and order of that Commission which, pursuant to 49 U.S.C.A. § 5(2), approved, under specified conditions, the

acquisition by the Chesapeake & Ohio Railway Company of capital stock control of the Baltimore & Ohio Railroad Company. The Commission also approved the issuance by the C & O of the required number of shares of its own authorized stock in exchange for capital stock of the B & O. 49 U.S.C.A. § 20(a). The Commission's report is styled Chesapeake & Ohio Railway Company—Control—Baltimore & Ohio Railroad Company, 317 I.C.C. 261 (1962). Subsequent to the filing of the complaint, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and others, were allowed to intervene as parties plaintiff, and the above mentioned railroads were permitted to intervene as parties defendant. We shall refer to the C & O acquisition of B & O stock as the C & O-B & O affiliation.

Broadly stated, the attack upon the Commission's report and decision is bottomed upon plaintiffs' and intervenors' contentions that the report contained insufficient findings upon which to base its conclusion; that the Commission gave inadequate consideration to the effect of the affiliation upon other railroads and railroad employees, and upon the public; and that the Commission erred in denying motions made by intervening opponents of the C & O application to defer decision on the matter and to consolidate the hearing before it with other pending matters.[1] The Department of Justice supported such motions.[2] The other

[1] These motions were made after the record had been closed. The hearings had extended from June 19 to October 9, 1961. They were held in seven cities, some 394 witnesses were heard, whose testimony resulted in a transcript of 5686 pages and some 550 exhibits were received. Upwards of 100 intervenors appeared, many of whom opposed the C & O applications. More than 60 attorneys appeared for the intervenors.

[2] After the commencement of this cause, the Attorney General of the United States, appearing on behalf of the United States, the statutory defendant, filed an answer which "admits that the order of the Interstate Commerce Commission is erroneous, in that it is not supported by adequate findings upon substantial evidence with respect to the impact upon other railroads of the proposed acquisition * * *." The formal prayer of his answer is "that the order of the Commission be set aside and the case be remanded to the Commission for further proceedings". His briefs and arguments to this court, however, may be fairly read to be his request

matters pending were the merger application of the New York Central Railroad Company and the Pennsylvania Railroad Company, and the unification application of the New York, Chicago and St. Louis Railroad Company (The Nickel Plate), the Wabash Railroad Company and the Norfolk & Western Railroad Company. These applications are pending before the Commission, and are at intermediate stages in the hearings necessary to final decision.

It should be preliminarily observed that there is little dissent from recognition that if the railroads of this country are to survive as instrumentalities to adequately serve the transportation needs of the country, mergers of the large and small railroads in various groupings will have to take place. The record before us seems to make clear that this trend to merger will likely eventuate in there being substantially fewer independently operating railroad systems serving the northeast quadrant of the United States than now exist. It may be that the ultimate grouping into these major railroad systems will follow the lead made by the larger railroads now applying for approval of plans presently before the Commission. It should be borne in mind, however, that the Transportation Act of 1940, 54 Stat. 899, 49 U.S.C.A., § 1, et seq., does not give to the Commission or to the courts any power to compel the regrouping of the railroads involved, or to require any railroad to merge or join with any other railroad. *St. Joe Paper Co.* vs. *Atlantic Coast Line R. Co.*, 347 U.S. 298, 305, 98 L. Ed. 710, 719. As early as 1920, Congress recognized that the health of our railroads could only be protected by merging into fewer systems the facilities and economic power of the great number of railroads then in existence in the United States. To serve that end, Congress enacted the Transportation Act of 1920, which directed the Interstate Commerce Commission to consider

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that such further proceedings include the consolidation of the C & O application with two railroad merger applications now before the Commission, and to withhold decision of the C & O matter until conclusion of the hearings on such other applications, to the end that a contemporaneous decision might be made of all the pending control and merger applications which involve the eastern railroads.

the problems of consolidation, make the necessary investigations, and to go forward with a national plan for bringing about such a reorganization of the railroads of this country. The Transportation Act of 1920 directed the Commission to "prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems". 41 Stat. 481. No good purpose would be served by here detailing the history of the efforts of the Commission and Congress to provide for compulsory reorganization of the country's railroads. A summary of that history may be found appended to the opinion of the Supreme Court in *St. Joe Paper Co.* vs. *Atlantic Coast Line R. Co.*, 347 U.S. 298, 315-321, 98 L. Ed. 710, 724-727. Suffice it to say that by 1940 it was apparent to both the Commission and Congress that the national plan was a failure. *Schwabacher* vs. *United States*, 334 U.S. 182, 193, 92 L. Ed. 1305, 1313. Congress then took a new approach in the Act of 1940 by authorizing that the needed mergers be initiated and carried out by the voluntary and private action of the railroads involved, subject always to the supervision and approval of the Interstate Commerce Commission. *Schwabacher* vs. *United States*, 334 U.S. 182, 193, 92 L. Ed. 1305, 1313. It might be well to mention at this time that during the year 1962, interested parties sought to have Congress declare a moratorium upon the accomplishment of mergers of railroads with assets in excess of $200,000,000.00, unless the mergers met the standards of the anti-trust laws. Although extensive hearings were conducted, at which both proponents and opponents of the Interstate Commerce Commission's case-by-case approach to the merger problem were heard, no legislation has emerged from the proposal. See, *Hearings on S. 3097 Before a Subcommittee of the Senate Committee on the Judiciary*, 87th Cong., 2d. Sess. (1962).

The action of the C & O and B & O railroads here under consideration was initiated by these railroads pursuant to the 1940 Act. The Commission, in considering the application of the C & O for control of the B & O, was bound

to consider whether or not the sought for control would be consistent with the present policy of Congress, and whether or not it would be detrimental to or inconsistent with the public interest, the interest of labor, and whether overall desirable ends would be served by allowing a reorganization of railroads through stock acquisition, mergers, and otherwise. See, *New York Central Securities Corp.* vs. *United States*, 287 U.S. 12, 25, 77 L. Ed. 138, 146; *McLean Trucking Co.* vs. *United States*, 321 U.S. 67, 87, 88 L. Ed. 544, 556-557.

The pertinent statutory authority under which the attacked action was taken, Title 49, U.S.C.A., Section 5(2), sets forth in subparagraph (c) thereof the matters that must be considered by the Commission before approving such action:

> "(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."

Subparagraph (b) of § 5(2) authorizes approval of a proposed transaction, if the Commission finds that it "will be consistent with the public interest". In its report, the Commission asserts that it found the proposed affiliation consistent with the public interest, and that it took into consideration all of the above matters required of it and sets forth in extensive detail its review of the evidence, its appraisal thereof, and the weight given to it. It made findings of fact from that evidence and concluded that all of the criteria necessary for its approval of the C & O-B & O affiliation had been established. Commissioner Tucker,

with the concurrence of Commissioner Webb, dissented.[3] Commissioner Bush filed a separate dissent, limited to his position that the C & O-B & O matter should be only as a merger proposal, and consolidated for decision with the PRR-NYC and the N & W-Nickel Plate cases.

In this lawsuit, our review of the Commission's action is a limited one. We do not start anew and, on the basis of our own judgment, determine whether acquisition of control of the B & O by the C & O should be approved. Congress has committed that judgment to the discretion of the Commission. *Minneapolis & St. Louis R. Co.* vs. *United States*, 361 U.S. 173, 188-189. We are limited to determining whether any errors of law were made by the Commission, whether its action was arbitrary, capricious or an abuse of its discretion, and upon review of the whole record, whether its findings of fact are supported by substantial evidence. Title 5, U.S.C.A., Section 1009 (e); *Universal Camera Corp.* vs. *NLRB*, 340 U.S. 474, 95 L. Ed. 456. See also, *General Motors Corp.* vs. *United States*, 207 F. Supp. 641, 643-644 (E.D. Mich., 1962); *United States* vs. *Pierce Auto Freight Lines*, 327 U.S. 515, 90 L. Ed. 821; *Mississippi Valley Barge Line Co.* vs. *United States*, 292 U.S. 282, 78 L. Ed. 1260. If the findings of the Commission are supported by substantial evidence on the whole record, we may not set them aside. Likewise, the weighing of the evidence is reserved exclusively for the Commission. *United States* vs. *Carolina Freight Carriers*, 315 U.S. 475, 490, 86 L. Ed. 971, 983. It is not within the province of the reviewing court "to substitute inferences of its own for those drawn by the Commission from testimony and * * * to weigh anew conflicts in it." *Chicago St. P., M. & O.R. Co.* vs. *United States*, 322 U.S. 1, 3, 83 L. Ed. 1093, 1095.

The primary question before us is whether the findings

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[3] Dissenting Commissioner Tucker agrees that there is critical need for prompt action in railroad rearrangement. Referring to such problem he says, "Seldom has any single problem of the American economy received so much attention from so many sources *with so few results*. * * * Eastern railroad problems must not be minimized. *Prompt and positive action* by the Commission has been urgently called for and *no doubt is needed*." (Emphasis supplied) 317 I.C.C. at 295, 297.

of the Commission are supported by substantial evidence on the whole record. As discussed more fully below, we hold that they are.

1. Adequacy of the Commission's Findings[4]

The Commission found that the B & O Railroad was in precarious financial condition. Its trackage, its rolling stock and other equipment had reached such a state of disrepair and inadequacy that its continued existence as a transportation facility was in serious jeopardy unless adequate financing and other help could be obtained to restore it to economic and physical health. The Commission concluded that the B & O railroad could not, by its own resources or by its borrowing power, obtain needed financing. This finding was supported by substantial evidence in the record made before it. There was evidence, and the Commission found, that the C & O, with control of the stock of the B & O, was in a position, by the use of its own resources and credit, to provide the means whereby the B & O could recover from its depressed condition and be restored to a healthy and economically sound transportation system. In addition to direct financial support to the B & O, the Commission found from evidence before it that the affiliation sought would provide opportunity and motivation for cooperative effort by the C & O and B & O; that substantial economies could be effected by the use of joint facilities and personnel and the pooling of equipment; and that such accomplishments would permit the B & O to "become a stronger railroad and the efficiency and economy of its operations will be increased". The Commission found, on the evidence, that "Strengthened as a result of the control, B & O's ability to meet the needs of commerce and the national defense will be enhanced". We are impressed that there was substantial evidence in the

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[4] For convenience of discussion, we shall refer to the plaintiff, intervening plaintiffs, and the Department of Justice as the plaintiffs; and to the defendant Commission and the intervening railroads, the C & O and B & O, as defendants.

record to support such findings and that such findings add weight to the Commission's ultimate conclusion that the C & O-B & O affiliation was consistent with the public interest.

> "• • • the term 'public interest' • • • is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities • • •". *New York Central Securities Corp.* vs. *United States*, 287 U.S. 12, 25, 77 L. Ed. 138, 146.

The most active adversary of the C & O-B & O railroads during the hearings was the New York Central Railroad. It contended that to allow C & O to acquire B & O would cause it irreparable damage in that their combined strength would divert a very substantial portion of the traffic of the New York Central. It had employed experts who made studies of the claimed diversion. They testified to their opinion that the C & O-B & O affiliation would divert 41% of Central's traffic. Such estimate was opposed by evidence offered by the C & O and full play was given to the evidence and arguments upon the issues drawn by the principal adversaries. The Commission's report adequately reviewed the weight it gave to the evidence offered by these adversaries upon the question of the effect of the proposed affiliation upon diversion of traffic, not only upon Central but upon other railroads that might be affected by the operations of the C & O-B & O. The Commission was of the opinion that the conclusion of Central's experts was unwarranted.

It is the contention of the plaintiffs here, however, that the Commission's finding that "no undue amount of traffic will be diverted from Central" is inadequate. They contend that it should have made a specific determination as to how much traffic would be diverted from Central. We cannot agree. The Commission was not required to engage in speculation and guesswork to come up with a

precise percentage prediction. In its findings, the Commission carefully reviewed the testimony given by Central's witnesses, gave its reasons why it found their estimates unreliable, and reviewed the evidence supportive of its conclusion that the claimed diversion of traffic from Central would not be undue. The Commission said:

> "We have carefully examined the estimates of traffic diversion submitted by Central and by C & O-B & O. They vary widely in their estimates of the amount of traffic subject to diversion and were prepared on different bases. In many respects they are not comparable. Based on these estimates, their background material, and other information of record, including particularly the effect of the transaction on the Nation's railroads and, in turn, on the public, we conclude that no undue amount of traffic will be diverted from Central. We have found from our past experience in similar proceedings that the diversion of traffic in the volume predicted rarely, if ever, occurs. Although we realize that at present Central is not well able to absorb any substantial loss of traffic, we believe that the benefit to the public from approval here will far outweigh the harm to Central. The findings here specifically provide that interested parties may file applications for modifications of the routing and channels of trade conditions and this would be adequate to protect Central from all except ordinary traffic solicitations to which it is now exposed in the normal course of its business. We conclude that the prospective loss of revenue to Central is not such as to require disapproval here." 317 I.C.C. at 282, 283.

We are of the opinion that this was sufficient.[5] Cf., *McLean Trucking Co.* vs. *United States*, 321 U.S. 67, 89.

A further contention of the plaintiffs is that even though the Commission considered the question of diversion of

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[5] After the conclusion of the hearing, Central withdrew its opposition to the proposed affiliation, and has not joined the plaintiffs in the case before us.

traffic from New York Central, it did not extend its consideration to the amount of traffic that will be diverted from other railroads not parties to the proceeding. We find that early in its report the Commission said, "As indicated hereinafter, it does not appear that there will be any undue diversion of traffic from Central by reason of the C & O-B & O affiliation or *that any rail Carrier will be unduly injured.* It is significant that no other railroad seeks to be included in the C & O-B & O control transaction. * * * We conclude later herein that approval of the control in this proceeding will not result in any undue diversion of traffic from Central *or other rail carriers*". (Emphasis supplied) 317 I.C.C. at p. 265.

In addition to the Commission's right to rely on its own expertise and judgment, *Market Street R. Co.* vs. *Railroad Com. of Cal.*, 324 U.S. 548, 560, 561, it had substantial evidence before it from which to draw its conclusion that neither from the standpoint of competition nor diversion of traffic would other railroads be unduly prejudiced by approval of the C & O application. Representatives of a large number of the major shippers using the eastern railroads testified that the C & O-B & O affiliation would not cause any change in their habits of choosing rail carriers for their traffic. These witnesses did not limit their observations to diversion of traffic from the New York Central, but included eastern rail carriers generally in their opinions. Shippers are the primary source of all freight traffic and their opinions are, accordingly, of impressive weight. In addition to such testimony, informed representatives of the C & O and B & O testified that the control sought would not result in substantial diversion of traffic from their rail competitors. The briefs of plaintiffs here do not persuade us that such evidence was seriously impeached and the credibility of such witnesses and the weight of their testimony were for the Commission.

In addition to the Commission's findings, quoted above, it further expressed itself on the subject as follows:

> "On this record, there appears to be no reasonable basis for the conclusion that control of B & O by C & O

would seriously affect the ability of Central *or any other* carrier to provide adequate transportation to the public." 317 I.C.C. 284.

"No other rail carrier will be placed at such a competitive disadvantage or otherwise unduly affected as a result of the transaction as to warrant disapproval. No other carrier has asked to be included in the transaction and there is no evidence of record showing that the public interest requires the inclusion of any other carrier." 317 I.C.C. 292.

"Thus, we must estimate the scope and appraise the effects of curtailment of competition which will result from the proposed control and consider them along with the advantages of improved service, safer operation, lower costs, et cetera, to determine whether the control *will assist in effectuating the overall transportation policy.* Suffice it to say that we have herein considered and discussed the referred to factors and we conclude that the control will assist in effectuating the overall transportation policy." 317 I.C.C. 292.

We hold that the Commission did give consideration to the effect of the affiliation on other railroads, that it made adequate findings on the subject and that such findings were supported by substantial evidence.[6]

Plaintiffs further attack the Commission's report by arguing that the Commission's report is fatally deficient in that it lacks adequate subsidiary findings. Section 8(b) of the Administrative Procedure Act, 5 U.S.C.A. § 1007(b), provides that decisions of administrative tribunals shall include a statement of findings and conclusions, as well as the reasons or basis therefor, upon all material issues of fact, law, or discretion. This statutory provision re-

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[6] Special caution was shown by the Commission in this regard by its imposition of "Conditions to insure the maintenance of existing routes and channels of trade" set forth in Appendix VII to its report. (317 I.C.C. 345) Such conditions are designed to prevent injury to other rail carriers, and by them the Commission retains jurisdiction to modify them, upon application, should need therefor arise.

quires subsidiary findings only upon those issues which are material, but not those which are collateral. *Minneapolis & St. Louis R. Co.* vs. *United States*, 361 U. S. 173, 193-194. To comply with this rule, it is enough if an administrative agency, such as the Interstate Commerce Commission, sets forth in its decision a reasonable review of the evidence before it, the weight which has been given to such evidence, its own resolution of the conflicts therein, and expresses its findings and conclusions necessary to support its ultimate findings. *Alabama Great Southern R. Co.* vs. *United States*, 340 U.S. 216, 227-228, 95 L. Ed. 225, 237; *Minneapolis & St. Louis R. Co.* vs. *United States*, 361 U.S. 173, 193. The findings expressed by the Commission in its report sufficiently exposed its view of the evidence and the basis upon which it came to its ultimate conclusion that the criteria essential to approval were present and established by the proofs made before it on its extended hearing. We are of the opinion that the findings it made were adequate to support its order.

2. Adequacy of Investigation and Hearing

The C & O's application to acquire control of the B & O initiated the involved proceeding.[7] The following parties, among others, intervened and participated in the proceedings, to wit: the United States Department of Justice, the states of Massachusetts, Michigan, New York, Ohio, the Maryland Port Authority, the New York Port Authority, cities such as Battle Creek, Michigan, Centralia, Ohio, Erie, Pennsylvania, Evansville, Indiana, and New York City, dozens of shippers, and the Chicago and Eastern Illinois Railroad, Boston & Maine Railroad, Pittsburgh & Lake Erie Railroad, New York Central Railroad, and the Railway Labor Executives Association. The Department of

[7] The New York Central filed a rival application to acquire control of B & O or, in the alternative, to participate jointly with C & O in the control of B & O. This application was heard on a consolidated record with that of C & O. Central's application was withdrawn when its proposed merger with the Pennsylvania Railroad was announced.

Justice was present at, and participated in, the hearing through representatives from the office of the Attorney General of the United States; the New York Central Railroad and Railway Labor Executives' Association, the latter a plaintiff here, were there by their counsel, all of whom took some part in the hearings, either before the Commission Examiner or the full Commission, or both. The Railway Labor Executives' Association represents all of the railroad brotherhoods of the operating railroads in the United States and, through these, substantially all of the railroad employees of the American railroads.

It is contended here by plaintiffs that the Commission should have taken more evidence than it did; that it should have, on its own initiative, employed independent counsel, accountants and other experts, to investigate and to test the sufficiency of the evidence offered before it by the various parties. We should, initially, observe that no interested party was foreclosed from offering any evidence that it wished to offer. Railway Labor Executives' Association, intervenor there and here, offered the testimony of sixteen witnesses. No counsel present was denied the opportunity to cross-examine witnesses, and at no time during the hearing did any of the plaintiffs, or the Department of Justice, urge upon the Commission that it employ special counsel, accountants or other investigators to test the soundness of the evidence that was being offered by the railroads applying for its order of approval.

In their contention in this regard, plaintiffs properly assert that the Interstate Commerce Commission occupies a somewhat different position than the ordinary tribunal in that it is charged with the affirmative duty to look into and consider the interest of the public, and, in some measure, to thus be an advocate for the public interest. However, there is nothing in the statute requiring the Commission to actively promote opposition to applicants before it by hiring independent counsel or experts. A lack of confidence in the reliability and adequacy of the showing made before it may, indeed, prompt it to take such action. In this case, however, there were extended hearings with

able adversaries exploring all facets of the issues involved; in addition to the Commission's own concern for it, the public interest was represented by the office of the Attorney General of the United States; the Commission found that the evidence supporting the application was of such quality, credibility and accuracy as to persuade it that the public interest would be served by approving such application. In this context, it can hardly be said that the Commission's discretion was abused in its failure to have undertaken, by counsel and experts employed by it, an adversary attack upon the case made before it. Its concern for the public interest does not require the Commission to employ a "devil's advocate" to attempt destruction of evidence which it finds adequate and reliable.

We are not sure that we understand plaintiffs' complaint, first made here, as to the Commission's failure to, itself, employ so-called independent counsel and other experts. Should we assume that such neutrals would have been more successful in exposing some invalidity in the C & O-B & O position than the impressive array of advocates who opposed the application? Is it thought that some special counsel would exhibit greater concern for, and employ greater ability to protect, the public interest than the Commissioners themselves, and other participants who stood watch over the proceedings?

3. Effect of Control Upon Employees

Plaintiff, Brotherhood of Maintenance of Way Employees, and intervenor, Railway Labor Executives' Association, do not specifically attack that portion of the Commission's report which provides for the protection of the employees of the involved railroads as required by subsection (f) of Section 5(2), Title 49, U.S.C.A. The conditions imposed by the instant order were of broader scope than those imposed by the Commission in approving the merger of the Delaware-Lackawanna & Western railroad company with the Erie Railroad. The latter conditions were found

sufficient in the case of *Brotherhood of Maintenance of Way Employees* vs. *United States*, 189 F. Supp. 942 (E.D. Mich., 1960) affirmed 366 U.S. 169. The plaintiff unions, however, attack the present order because of its claimed threatened injury to employees of the C & O and B & O, and to railroad employees generally. At the time of the filing of the complaint herein, plaintiff sought, and obtained, a restraining order which substantially prevents the displacement of any of the employees of the C & O and B & O pending this Court's determination of this cause. Such restraining order has continued in effect up to the present time.

Plaintiffs now contend that the Commission did not give adequate consideration to the interests of employees, and that the evidence adduced gives warning of such injurious effects on employees that the plan should be struck down by denying the application without reference to the sufficiency of attached employee-protection conditions. In this regard, we quote from the Commission's decision and findings concerning the effect of the sought for approval upon the railroad employees. After making various estimates as to the number of employees who would be displaced and the additional persons who would be employed, the Commission said:

> "Over the past decade, the financial condition of B & O has resulted in frequent and extended furloughs of many of its employees. Employment conditions on the C & O have been much better. In the long run, the C & O-B & O affiliation will undoubtedly provide more job security. We realize, however, that consummation of the transaction will cause a substantial hardship to a number of employees and their families, and to some extent adversely affect business conditions in their communities. But we are not persuaded that the application should be denied for this reason. As a result of the affiliation, B & O's ability to render an efficient transportation service on a sound financial

> basis will unquestionably be strengthened. It is our opinion that the advantages that will accrue to the B & O, the C & O, and ultimately to the general public will far outweigh the adverse employee effects which the unification will entail. As we stated in the Southern Control case, 'it would not be in the public interest or compatible with the national transportation policy to deny the authority of Central's (Central of Georgia) facilities and the possible loss of jobs incidental thereto'. That statement is equally applicable here." 317 I.C.C. 285, 286.

It is observed that the merger of railroads and unification of their operation will inevitably entail some loss of employees' jobs, but the congressional policy recognizes that it is essential to saving our great transportation system that there be mergers and unifications to accomplish economies and the removal of duplication and unnecessary expense. The accomplishment of this purpose must inevitably have an impact upon the railroad employees. Recognition of this was what prompted Congress to require that no approval should be granted unless provision be made for protection of displaced employees. It is recognized that even though there will be some immediate hurt to railroad employees in the approval of mergers and affiliations, railroad employees, as well as all other members of the public, will, in the long run, find more and better opportunities if the country's total economic health is protected. We cannot say that the conditions imposed by the Commission do not adequately protect the rights of the employees in this situation.

4. Failure to Consolidate Control With Merger Applications

At the outset, we note that whether hearings should be consolidated is a matter committed to the discretion of the administrative agency. *American Trucking Association* vs.

United States, 326 U.S. 77, 83, 89 L. Ed. 2065, 2070; *Federal Communications Comm'n.* vs. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138, 84 L. Ed. 656, 659. *Cf.*, *United States* vs. *Northern Pacific Ry.*, 288 US 490, 501-502, 77 L Ed. 914, 921. We are not persuaded that the Commission abused its discretion in this regard or that the public interest was jeopardized by the Commission's disposition of the C & O-B & O affiliation without waiting for the completion of the hearings on the merger applications pending before it, or by its refusal to consolidate all pending applications and to dispose of them in one decision. The Commission's decision exposes its reason for such exercise of discretion. It should be noted too that the C & O application was not for approval of a merger, as were the other proceedings with which it was asked to consolidate this case. The Commission said, "Before C & O and B & O can effect * * * a merger, another application must be filed with this Commission. Approval of the application for C & O to control B & O will not foreclose our opportunity to consider the lawfulness of such a future merger application, nor will it prevent interested parties from raising objections to proposals of that application when it is presented to the Commission for its approval." 317 I.C.C. 265.

The efforts of the plaintiffs here to set aside the Commission's order is bottomed primarily upon a contention that the problems of all the railroads in the northeast quadrant of the United States should be considered together. In our view, such a program would be but a return to a policy that, after long frustration, was found to be unwise, both by the studies made by the Commission and by the Congress of the United States. It cannot be denied that many years were consumed in laborious effort on the part of the Commission to come up with a plan for the re-arrangement of the entire railroad system of the country. At the end of this long period of study and experience, it was the conclusion of those trying to solve the problem that the best solution was to entertain applications initiated by the railroads themselves, and to allow them to attempt, by mergers

and affiliations to slow down and arrest the economic deterioration of the American railroads.

The evidence in this case shows that the B & O, one of the very great railroad systems of the United States, is in critical condition. We think that it would be a disservice to the national policy to hazard the exposing of this railroad to continuing crises by postponing the help that appears to be available to it in the control proposal of the C & O. We cannot predict at this time how many months or years would be consumed in trying to find the perfect, or merely a better, solution of the problems of our eastern railroads, large and small. As stated by Justice Jackson, reviewing the failure of a nationwide plan, "waiting for the perfect official plan was defeating or postponing less ambitious but more attainable voluntary improvements." *Schwabacher* vs. *United States*, *supra*, 334 U.S. at p. 193. The Commission is satisfied that the approval of the application before it involving the C & O and B & O will be a definite step forward in solving this great national problem. We are not persuaded that the Commission is wrong. In all events, it is not our function to substitute our judgment for that of the Commission. *Minneapolis & St. Louis R. Co.* vs. *United States*, 361 U.S. 173, 188. The Commission's wisdom and experience, not ours, must determine whether its approval of the C & O-B & O affiliation is consistent with the public interest. *McLean Trucking Co.* vs. *United States*, 321 U.S. 67, 87.

We are satified that Commission committed no errors of law, that its action was not arbitrary, capricious or an abuse of discretion. We cannot say that its findings of fact are unsupported by substantial evidence on the whole record. While not controlling, we think it significant that no railroad has joined the plaintiffs, intervenors, or the Attorney General in this litigation. If Commission approval of the C & O control of B & O were prejudicial to the interests of either railroads, we might, indeed, expect the self interest of such other railroads, or groups of railroads, to urge them to join in the attack on it.

An order dismissing the complaint and dissolving the temporary restraining order may be presented for signature.

Dated: August 7th, 1963.

CLIFFORD O'SULLIVAN,
Circuit Judge,

THOMAS R. THORNTON,
District Judge,

STEPHEN J. ROTH,
District Judge.

A true copy.

JULIUS L. KABATSKY,
Clerk,

By R. MILLER,
Deputy Clerk,

APPENDIX B—Judgment and Decree of the District Court

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Civil Action No. 23,467

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, *Plaintiff*,

RAILWAY LABOR EXECUTIVES' ASS'N., *Intervenor Plaintiff*,

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, THE INTERNATIONAL ASS'N. OF MACHINISTS, AND THE BROTHERHOOD OF RAILWAY CARMEN OF AMERICA, *Intervenor Plaintiffs*,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Defendants*,

BALTIMORE & OHIO RAILROAD COMPANY, *Intervenor Defendant*,

CHESAPEAKE & OHIO RAILWAY COMPANY, *Intervenor Defendant*.

FINAL JUDGMENT AND DECREE

The above-entitled action having come on for hearing on May 21, 1963, before this Court, constituted as a three-judge district court under section 2284 of the Judicial Code, 28 U.S.C. § 2284, and this Court, on August 13, 1963, having filed its opinion, sustaining the assailed order of the defendant, Interstate Commerce Commission, it is hereby

ORDERED, ADJUDGED AND DECREED that the relief prayed for in the complaints be denied and that the complaints be dismissed, and it is hereby

FURTHER ORDERED, ADJUDGED AND DECREED that, upon consent of the parties and pursuant to Rule 62(c) of the Rules of Civil Procedure, the terms of the temporary restraining order previously entered by this Court, Judge

Thomas P. Thornton, on February 1, 1963, shall be continued in full force and effect pending disposition of an appeal by the plaintiffs to the Supreme Court of the United States, conditioned upon plaintiffs' docketing such appeal on or before October 1, 1963.

This the 23rd day of August, 1963.

CLIFFORD O'SULLIVAN,
United States Circuit Judge.

THOMAS P. THORNTON,
United States District Judge.

STEPHEN J. ROTH,
United States District Judge.

A true copy.

JULIUS L. KABATSKY,
Clerk.

By ——— ———,
Deputy Clerk.

Approved as to form:

/s/ WILLIAM J. MAHONEY,
for Brotherhood of Maintenance of Way Employees and Intervening Plaintiff Railway Labor Executives' Association.

/s/ CHARLES S. RHYNE,
for Intervening Plaintiffs Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, The International Association of Machinists, and the Brotherhood of Railway Carmen of America.

/s/ ROBERT W. GINNANE,
for Interstate Commerce Commission.

/s/ LIONEL KESTENBAUM,
for United States Department of Justice.

/s/ EDWARD K. WHEELER,
for the Chesapeake & Ohio Railway Company.

/s/ KENNETH H. EKIN,
for the Baltimore & Ohio Railroad Company.

APPENDIX C—Report and Order of the Interstate Commerce Commission

[This is the original text and the numbering of the pages is according to the page numbers in the ICC Report]

F-9195

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 21160 [1]

CHESAPEAKE & OHIO RAILWAY COMPANY—CONTROL—BALTIMORE & OHIO RAILROAD COMPANY

Decided December 17, 1962

1. Petitions to consolidate proceedings, to the extent they seek to consolidate these with other pending proceedings, denied.
2. Acquisition by The Chesapeake and Ohio Railway Company of control of The Baltimore and Ohio Railroad Company through ownership of capital stock, and by virtue of such stock ownership, indirect control of the common-carrier subsidiaries controlled by The Baltimore and Ohio Railroad Company, approved and authorized, subject to conditions.
3. Authority granted to The Chesapeake and Ohio Railway Company to issue not exceeding 2,055,398 shares of common stock, par value $25 per share, in exchange for the outstanding common and preferred stocks, par values $100 per share, of The Baltimore and Ohio Railroad Company, in connection with the acquisition of control herein authorized.

Burton K. Wheeler, Edward K. Wheeler, Robert G. Seaks, Eldon S. Olson, Hewitt Biaett, William R. Althans, Joseph C. Kauffman, John W. Hanifin, and *Doyle S. Morris* for applicant.

Kenneth H. Ekin, Andrew C. Armstrong, Albert W. Laisy, John L. Rogers, Jr., Robert D. Brooks, Robert W. Minor, James B. Gray, William C. Leiper, Richard J. Murphy, Gerard W. Glenn, Charles D. Mahaffie, George C. Demas, John D. Morrison, John F. Dolan, Alex L. Fricke, Richard O. Olson, Alfred A. Green, G. K. Nelson, Louis T. Duerinck, William G. Mahoney, James L. Highsaw, Jr., Edward J. Hickey, Jr., Homer S. Carpenter, William M. Maddox, John J. Coffee, James H. Dinkin, E. Riggs McConnell, William L. Marbury, Donald MacLeay, Louis J. Leftkowitz, Dunton F. Tynan, Arne C. Wiprud, Walter J. Myskowski, J. Bruce MacDonald, Leo A. Larkin, Sidney Brandes, Samuel Mandell, George H. Kinney, Arthur L. Winn, Jr., J. Raymond Clark, Edward K. Laux, Gordon P. MacDougall, Sidney Goldstein, F. A. Mulherns, Benjamin F. Gibson, Andrew R. Sarisky, Herbert T. Maher, Charles R. Seal, John T. Collins, Robert G. Bleakney, Jr., Neal J. Holland, Thomas P. Hackett, James W.

[1] This report also embraces Finance Docket No. 21161, The Chesapeake and Ohio Railway Company—Issuance of Capital Stock.

672599—63——1

Grady, Harold H. McLean, Karl J. Grimm, James C. Fannin, Gerald J. Weber, J. Edward Keefe, Jr., Henry E. Foley, and *Richard L. Hirshberg* for interveners.

REPORT OF THE COMMISSION

GOFF, *Commissioner:*

Exceptions to the examiner's report and recommended order were filed by the State of New York (State), jointly by the Port of New York Authority (port) and the city of New York (city), the Railway Labor Executives' Association (association), and jointly by The Chesapeake and Ohio Railway Company (C & O) and The Baltimore and Ohio Railroad Company (B & O). A statement in lieu of exceptions filed jointly by the Maryland Port Authority and the Baltimore Association of Commerce, hereinafter called the Maryland interveners, has been accepted as exceptions. The carriers filed a joint reply, and the association replied to their exceptions. Oral argument has been held.

By applications filed June 14, 1960, as amended, the C & O, sometimes hereinafter referred to as the applicant, seeks authority (1) under section 5(2) of the Interstate Commerce Act to acquire control of the B & O through acquisition of its capital stock, and by virtue of such transaction to acquire indirect control of B & O's common-carrier subsidiaries and affiliates, and (2) under section 20a of the act to issue not exceeding 2,055,398 shares of its authorized but unissued common stock in exchange for capital stock of B & O.

The New York Central Railroad Company (Central) and certain of its affiliated companies were permitted to intervene in these proceedings, by order of the Commission of June 24, 1960. Subsequently, the Central filed applications in Finance Dockets Nos. 21237 and 21238 for authority to acquire control of B & O. Hearings on the applications of Central and those of the applicant were held on a consolidated record, and briefs have been filed. At, or prior to the hearings, numerous petitions were granted for leave to intervene in one or more of these proceedings. After the close of the record herein, and pursuant to a petition filed by Central, the Commission, division 3, by order dated January 29, 1962, authorized Central to withdraw as an intervener in these proceedings and dismissed Central's applications to control B & O.

The hearing examiner found that the proposed transactions would be consistent with the public interest and otherwise in conformity with the applicable statutory requirements. He accordingly recommended that the transactions be approved, subject to certain conditions for the protection of employees and for the maintenance of existing routes and channels of trade. Our conclusions differ in some

respects from those of the hearing examiner. Certain pertinent excerpts from the examiner's report are contained in appendix I hereof. Except as modified or amplified herein, his findings of fact are adopted as our own.

On August 13, 1962, The Delaware and Hudson Company and The Delaware and Hudson Railroad Corporation, collectively referred to as D & H, filed a petition in which they requested that the proceedings in Finance Docket No. 21510 et al., Norfolk & Western Railway Company and New York Chicago & St. Louis Railroad Company—Merger, and related cases, hereinafter called the N & W-Nickel Plate merger case, and Finance Dockets Nos. 21989 and 21990, Pennsylvania Railroad Company—Merger—New York Central Railroad Company, hereinafter referred to as the PRR-Central merger case, be consolidated for decision. On August 31, 1962, D & H filed an amendment to its petition in which it requested that the instant proceedings (Finance Dockets Nos. 21160 and 21161) be consolidated for decision with the above-described proceedings. The C & O and B & O filed replies to the amended petition on September 19, 1962. On September 25, 1962, the New England Council, intervener herein, a nonprofit corporation whose object is the furtherance of the economic development of the New England States, filed a similar petition for consolidation. On October 4, 1962, the State, port, and city of New York filed a joint petition requesting that the instant proceedings and the N & W-Nickel Plate-Wabash merger case be reopened for further hearing and that those proceedings be consolidated with the PRR-Central merger case. Similar requests to determine all three cases simultaneously are included in some of the exceptions to the examiner's report and recommended order.

In support of its amended petition, D & H argues that the transactions involved in the three pending proceedings are interdependent and closely related. It asserts that the Norfolk and Western traffic will be subject to extensive diversion to the C & O system if the C & O-B & O affiliation is approved prior to the N & W-Nickel Plate-Wabash merger case, and since D & H is desirous of eventually becoming affiliated with the N & W system, any substantial diversion of traffic from N & W will adversely affect the D & H. In support of its petition, the New England Council contends that proper determination of the treatment of the New England carriers cannot be made unless we view as a whole the overall effects of the three proposed systems pending in the above-described proceedings.

The State, port, and city of New York argue for an overall master plan for the merger of eastern railroads. They point out that only the stronger or more desirable railroads are included in the pending applications. They argue that we must consider together each of the

pending affiliations in the East in order to determine the cumulative effect that such affiliations will have upon the competitive position of the other railroads operating in the same territory. In particular, they contend that if the instant transaction and the N & W-Nickel Plate-Wabash merger are approved, and the PRR-Central merger is not approved, there would be two rather than three large systems in the East, and the consequent diversion of traffic from Central and other carriers serving the State of New York would seriously impair their ability to render an essential transportation service.

Oral argument has been held on the question of the consolidation of the C & O-B & O proceedings with the PRR-Central and the N & W-Nickel Plate proceedings. For the most part, those in support of consolidation favored consolidation for decision purposes rather than a consolidation of the records. Some merely requested that the final decision in each proceeding be issued simultaneously. The Central is among those who requested consolidation for decision or, in the alternative, simultaneous decisions by the Commission. It argues that while there is a need for expedition in the determination of the three pending proceedings, there is no immediate urgency which requires the C & O control application to be processed in advance of the other two.

The Department of Justice urges that the proceedings in the C & O-B & O case and those in the N & W-Nickel Plate case be reopened and consolidated into one record for further hearing with the PRR-Central proceedings. It argues that a separate decisional approach to the pending proposals does not permit us to effect conditions or adjustments that may subsequently prove to be necessary in the public interest. Proponents of consolidation emphasize the interrelationships of each of the three pending proceedings, the magnitude of the proposals, the impact thereof upon carriers not included in any of the proposed transactions, and the absence of evidence to determine whether a three-system plan in the East would be consistent with the public interest.

Among those opposed to consolidation of the proceedings are the Pennsylvania Railroad and coal shipping interests represented by the National Coal Association and the Property Owners Committee. The shipping interests take no position as to the merits of the individual transactions, but request that each of the transactions be determined as expeditiously as possible. They contend that consolidation is sure to result in complications and the delay caused thereby would operate to the detriment of the best interests of their members since adequate planning for the movement of their traffic would remain in a state of suspension.

The main argument against consolidation of the proceedings is that there is a basic difference between the application of C & O to acquire control of B & O and the merger applications pending in the PRR-Central and the N & W-Nickel Plate proceedings. Applicant and B & O contend that there is no basis for comparing the subject proceeding with those proceedings. In contrast to the complete integration of railroads where mergers are involved, the proposed control of B & O by the C & O involves only an acquisition of controlling stock interest. After C & O acquires control of B & O, these railroads will continue to operate as separate carriers, the identity of the B & O will remain unchanged, and complete integration of their operations and facilities cannot be accomplished. Before C & O and B & O can effect such a merger, another application must be filed with this Commission. Approval of the application for C & O to control B & O will not foreclose our opportunity to consider the lawfulness of such a future merger application, nor will it prevent interested parties from raising objections to proposals of that application when it is presented to the Commission for its approval.

The consolidation of this proceeding with the other two proceedings even for decision purposes or the withholding of a determination in this proceeding for simultaneous determinations in all proceedings would result in delays that would cause immediate serious injury to B & O and ultimately to the general public. Even longer delays would ensue by consolidating the evidentiary records in these three cases. As well be shown in more detail elsewhere in this report, the present physical and financial condition of the B & O demands an expeditious disposition of the instant proceedings. As indicated hereinafter, it does not appear that there will be any undue diversion of traffic from Central by reason of the C & O-B & O affiliation or that any rail carrier will be unduly injured. It is significant that no other railroad seeks to be included in the C & O-B & O control transaction. Little weight can be accorded to the contention of the New York interests that if the applications here and the N & W-Nickel Plate-Wabash merger are approved, but the PRR-Central merger is denied, the consequent diversion of traffic from Central and other carriers serving the State of New York would seriously impair their ability to render essential transportation service. We conclude later herein that approval of the control in this proceeding will not result in any undue diversion of traffic from Central or other rail carriers. The relative effects of approvals or denials in the merger cases will be considered when determinations are reached in those cases. The possibilities with respect to our actions in those cases and the results from those actions are too remote and unpredictable to warrant withholding action in the instant proceeding, particularly in view of the

present status of those cases[2] and of the poor financial condition of B & O.

We possess the power in appropriate circumstances either to consolidate proceedings in which the issues are similar or closely related, or to postpone a particular decision when so required by the public interest. However, the established need for expedited action in these proceedings overrides any possible benefit which could accrue through the consolidation of proceedings with the resulting delay. We conclude that the public interest requires our decision in these proceedings at this time. Accordingly, the petitions to the extent they seek to consolidate these proceedings with the other two proceedings are denied. However, without prejudging the issue in any way, we will hold in abeyance the additional question as to whether the PRR-Central and the N & W-Nickel Plate proceedings are to be consolidated or considered at the same time.

The proposed control of B & O by C & O would be acquired under the terms of an exchange offer to all B & O stockholders whereby C & O would exchange one share of C & O common stock for each share of B & O preferred stock or for each 1¾ shares of B & O common stock. Under the terms of the exchange offer, only full shares would be issued, and any B & O assenting shareholder who is entitled to a fractional share has the privilege of selling his fractional share interest or of rounding it out to a full share by buying the difference.

In its original form, the applicant's proposed exchange offer to holders of B & O stock, dated June 14, 1960, was conditioned upon acceptance by holders of 80 percent of B & O shares, although C & O reserved the option to consummate the plan even if a lesser percentage accepted. As originally issued, the exchange offer was to expire on September 12, 1960, but the expiration date was subsequently extended. The exchange offer provided, among other things, that to accept the offer B & O stockholders must deliver their stock certificates to a designated exchange agent, together with a prescribed completed form of acceptance. It further provided that each certificate of B & O stock delivered to the exchange agent for acceptance of the offer would be endorsed with a legend that the holder's interests are subject to the terms of the exchange offer, which provide that upon the exchange offer becoming effective all interests of such holder or transferee are automatically transferred to C & O, and he automatically becomes entitled to shares of its common stock at the above-stated exchange ratio. Such legend was stamped on all shares of B & O stock tendered for exchange pursuant to orders of the Com-

[2] The hearing in the PRR-Central merger case is still in progress. No report and recommended order of the hearing examiner has been issued on the N & W-Nickel Plate merger case.

mission dated July 1, 1960, and January 13, 1961, in Finance Docket No. 21161.

As of December 14, 1960, approximately 60 percent of B & O's stockholders had assented to transfer 55 percent of B & O stock in response to the C & O exchange offer. Since less than 80 percent of the B & O stock had been assented, B & O stockholders had the right to withdraw under the terms of the original offer. On December 22, 1960, C & O's board of directors decided to make its exchange offer binding if a majority of the B & O stock remained assented after the expiration of a 30-day withdrawal period provided for in the offer. At the request of numerous B & O stockholders, C & O agreed to accrue for them at least for 1 year the difference between the dividends received as B & O stockholders and what they would have received as C & O stockholders. In order to make this dividend accrual feature available to other B & O stockholders, C & O announced that it would accept additional assents during the 30-day withdrawal period. At the expiration of the withdrawal period, holders of 1,908,502 shares (61 percent) of B & O stock had accepted the exchange offer.[3]

The exchange ratio was decided upon and approved by the directors of both C & O and B & O after several months of study and negotiation. Among the factors considered in the study were (1) the price history of the common stock of B & O and C & O and the preferred stock of B & O, (2) the dividend record of all three issues, (3) the financial structure of both railroads and the credit rating of B & O with particular reference to its large debt refunding operation in 1955 and the subsequent decline in the price of its new bonds, (4) the earnings trend of C & O with particular reference to the absence of growth potential in its territory and the declining importance of coal in the national fuel picture, (5) the earnings trend of B & O noting especially the erosion of profit margins in the period 1957 through 1960. In addition, it was considered necessary to offer B & O stockholders a small premium over the then current market value of their common stock. The proposed stock exchange arrangement has been approved by 80.36 percent of the C & O stockholders and by a majority of the B & O stockholders as well as by managements and directorates of both railroads. No one has interposed any formal objection to the proposed exchange ratio and no alternative plan has been presented. If all B & O stock were presented for exchange, it would be necessary for C & O to issue not exceeding 2,055,398 shares of its common stock.

In order to show more comprehensively the financial status of the applicant and B & O, we deem it advisable to enlarge upon the

[3] This includes all stock purchased by C & O

examiner's statement of fact with respect thereto. Attached hereto as appendix II is a comparative general balance sheet of applicant as of December 31 for the years 1960 and 1961. Applicant's total assets as of December 31, 1960, were $1,065.9 million as compared with $1,074.5 million as of December 31, 1961.[4] The latter amount is composed of current assets $123.2 million, including cash $20.1 million and temporary cash investments $42.4 million; special funds $2.6 million; investments $95.1 million; total properties, less depreciation and amortization, $847.5 million; and other assets and deferred charges $6.1 million. As reflected in appendix II, investments increased from $62.6 million to $95.1 million in 1961. This increase is due principally to the acquisition of additional shares of common capital stock of the Western Maryland Railway Company, increasing applicant's investment in that road from 142,000 shares at approximately $4.5 million to 325,000 shares at approximately $10.8 million, and the acquisition of 578,875 shares of common and 9,000 shares of preferred capital stock of the B & O for $23,744,983 and $480,987, respectively.

Applicant's authorized capital stock consists of 650,000 shares of 3½-percent convertible preferred stock, par value $100 per share, and 12,000,000 shares of common stock, par value $25 per share. As of December 31, 1961, the applicant had 25,004 shares of preferred and 8,221,238 shares of common stock outstanding. Applicant's shareholders' equity as of December 31, 1961, of $624.5 million is made up of capital stock of $208,052,653, representing 25,004 shares of preferred, par value of $100, $2,500,400, 8,221,238 shares of common, par value $25, $205,531,028,[5] and stock liability for conversion of $21,225; capital surplus $15,181,742 and retained income $401,297,465. Applicant's shareholders' equity of $624.5 million was approximately 1.4 times total debt (total liabilities excluding shareholders' equity) of $450.0 million as of December 31, 1961.

Applicant's current liabilities of $73.5 million as of December 31, 1961, represent a net increase of $14.1 million during that year, the principal comparative variables consisting of decreases of $1.0 million in Federal income tax accruals and $0.7 million in other taxes accrued, increases of $1.8 million in other current liabilities, and a substantial increase of $13.2 million in accrued accounts payable. The last mentioned increase is due principally to accounting adjustments to effect the transfer of certain liabilities from a deferred to a current position, the largest of which is in the amount of $8.7 million to comply with Accounting Series Circular No. 127 issued by our Bureau of Accounts

[4] Portions of the data included in appendixes II to VI, inclusive, are based upon Annual Reports Form A to this Commission. The parties stipulated that such reports from and after 1950 be incorporated by reference into the record.

[5] Includes scrip of $78.

on February 47, 1961, wherein accruals for employees' vacations earned in 1960 and 1961, and due within 12 months from December 31, 1961, were transferred from Casualty and Other Reserves to Accrued Accounts Payable. As a result, these transfers contributed to the decrease in net working capital (excess of current assets over current liabilities), which as of December 31, 1961 was $49.7 million or $13.3 million less than that as of December 31, 1960. However, the net working capital position of applicant of $49.7 million is considered substantially adequate for orderly operations since it is approximately 2.6 times the 1961 mean monthly average of $18.9 million for operating expenses before charges for depreciation.

As of December 31, 1961, applicant's long-term debt aggregated $355.2 million of which $18.4 million is due within 1 year. Funded debt of $224.2 million includes 11 issues, bearing interest from 4⅜ to 5 percent, maturing between 1963 and 1999. With the exception of a collateral promissory note dated March 15, 1961, and maturing February 15, 1963, in the amount of $24.2 million, the balance of funded debt is subject to nominal annual maturities and sinking fund requirements through 1973 in amounts ranging from $1.3 million to $5.0 million. Equipment obligations of $131.0 million, bearing interest from 2 to 5.75 percent, mature serially to 1977, with annual requirements ranging from $14.1 million to $16.9 million.

The final value for ratemaking purposes as of June 30, 1916, of applicant's used property was $197,460,975. The net additions and betterments to the property, before depreciation, from that date to December 31, 1959, including acquisition of the property of the Pere Marquette Railway Company, amounted to $1,023,578,887.

Appendix III hereof is a comparative income statement of applicant for the years 1957 to 1961, inclusive. For this 5-year period applicant's total annual railway operating revenues averaged $359.0 million. Revenues declined each year from the high of $432.3 million in 1957 to the low of $316.0 million in 1961, a decline of $116.3 million or 26.9 percent. The largest decline sustained under a preceding year was in 1958 when revenues were $76.6 million under 1957. Total annual railway operating expenses for the 5-year period averaged $267.1 million. Such expenses amounted to $299.9 million in 1957, a high for the 5-year period. The amount of $256.6 million for 1961 was $43.3 million less than the 1957 amount, a reduction of 14.4 percent. The decline in operating revenues during the 5-year period exceeded the reduction in operating expenses by 12.5 percent. Operating ratios for the years 1957 to 1961, respectively, were 69.37, 71.69, 74.53, 77.11, and 81.21 percent or a 5-year average of 74.78 percent. In 1961 operating expenses were reduced $8.3 million under 1960, despite increased cost of material and wage rates, principally as a result of modern equipment installations. Net income for the 5-year period averaged $47.4

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million per year with a high of $67.6 million in 1957 and low of $29.6 million in 1961. Earnings of $3.60 per share of common stock were realized in 1961 and dividends of $4.00 were paid. The following table shows the amount of dividends declared and paid by applicant during the indicated 5-year period:

(000 omitted)

Year	Preferred	Common	Total
1957	$220	$32,279	$32,499
1958	182	32,394	32,576
1959	106	32,625	32,731
1960	94	32,748	32,842
1961	89	32,845	32,934
Total	691	162,891	163,582

Appendix IV attached hereto is a comparative general balance sheet of B & O as of December 31 for 1960 and 1961. Total assets amounted to $1,252.4 million as of December 31, 1960, as compared with $1,153.1 million as of December 31, 1961, a reduction of $99.3 million within the year. Total assets of $1,153.1 million as of December 31, 1961, is made up of current assets $69.4 million; special funds $3.5 million; investments $307.7 million; total properties, less depreciation and amortization, $763.7 million; and other assets and deferred charges $8.8 million.

The $99.3 million reduction in B & O's total assets during the year 1961 was due principally to three factors, (1) operations for the year produced the greatest net loss in the company's history, (2) the reduction in the recorded values of certain investments, and (3) the write-off of certain uncollectable receivables. B & O's current assets reflect a net reduction within the year of $20.8 million. The principal amounts affected were cash and temporary cash investments which were reduced by a total of $11.0 million, chiefly as a result of an out-of-pocket loss from operations of approximately $13.0 million; and the conversion of a favorable (debit) balance in traffic and car-service balances (of $4.2 million as of December 31, 1960) into a credit balance (under current liabilities) in 1961. Receivables were subjected to writeoff of $6.4 million; and material and supplies shows a reduction of $2.0 million. Investments in affiliated companies were reduced by $14.1 million during the year, representing the net of investments made and those disposed of or written down. A reserve for adjustment of investment in securities of $26.0 million was established during 1961 by a charge against retained income—unappropriated. This entry was made to provide a reserve for excess of book value over market value of B & O's investment in Reading Company capital stock. The book value of that stock is approximately $64.0 million and the reserve of $26.0 million so established was considered adequate

to reflect the permanent decline in market value of this investment. Total other assets and deferred charges were reduced by $15.3 million during 1961 principally as a result of numerous adjustments to effect the writeoff of claims and interline balances.

As of December 31, 1960, B & O's net working capital was $13.5 million. As of December 31, 1961, current liabilities exceeded current assets by $24.4 million, creating a deficit working capital position or a reduction of $37.9 million within the year, which is reflected principally in accrued accounts payable which increased $19.4 million during 1961 and other taxes accrued which increased $6.8 million. The increase in accrued accounts payable includes the accrual of $9.1 million for estimated vacation pay not heretofore entered in B & O's books; and the increase in other taxes accrued includes $6.5 million additional accrual for real estate taxes. Long-term debt as of December 31, 1961, aggregated $417.6 million of which $12.9 million was due in one year. Funded debt of $347.8 million includes 16 separate issues, bearing interest ranging from 3 to 5 percent and maturing from 1964 to 2010. Equipment obligations of $65.5 million bear interest ranging from 2½ to 5½ percent, and are payable serially to 1973. Included also in long-term debt is an amount of $4.3 million payable to affiliated companies.

B & O's authorized capital stock consists of 600,000 shares of 4-percent preferred stock, par value $100 per share, and 6,412,576 shares of common stock, par value $100 per share, of which 599,998 shares and 2,546,951 shares, respectively, were outstanding in the hands of the public on December 31, 1961. Shareholders' equity as of December 31, 1961, of $627.0 million includes 599,998 shares of preferred stock, $100 par value, $59,999,807; 2,546,951 shares of common stock, $100 par value, $254,695,148; capital surplus $4,172,091; and retained income $308,089,183. The total shareholders' equity of $627.0 million is approximately 1.2 times the total debt (total liabilities excluding shareholders' equity) of $526.1 million.

The final value for ratemaking purposes of the railroad properties owned by the B & O and its subsidiary companies on their valuation dates, as found by the Commission, was $659,453,455. The net additions and betterments from the respective dates of valuations of such properties to December 31, 1958, amounted to $590,058,095.

A comparative income statement of B & O for the years 1957 to 1961, inclusive, is attached hereto as appendix V. For this 5-year period, B & O's total annual railway operating revenues averaged $396.0 million, with a high of $461.3 million in 1957 and a low of $351.4 million in 1961. Total annual railway operating expenses for the 5-year period averaged $325.6 million, with a high of $373.3 million in 1957 and a low of $304.5 million in 1961. Operating ratios for the years 1957 to 1961, respectively, were 80.91, 80.74, 81.23, 82.23,

and 86.65 percent, and the average for the period was 82.22 percent. Net income for the 5-year period averaged $5.3 million per year with a high of $24.1 million in 1957 and low in 1961 when B & O had a deficit of $31.3 million. The following table shows the amount of dividends declared and paid by B & O during the indicated 5-year period:

(000 omitted)

Year	Preferred	Common	Total
1957	$2,400	$6,367	$8,767
1958	4,800	7,641	12,441
1959	2,400	3,820	6,220
1960	2,400	1,528	3,928
1961	None.	None.	None.
Total	12,000	19,356	31,356

Attached hereto as appendix VI is a statement showing B & O's investments in affiliated and other companies as of December 31, 1961.

Since the principal issues raised on exceptions by the State, port, city, and association are substantially similar, they will be discussed together. Specifically, one or more of the exceptants assert that the examiner erred in concluding that: (1) B & O's freight car supply is inadequate, (2) there is considerable deferred maintenance of B & O's line, (3) B & O cannot finance its own modernization program, (4) C & O will provide financial aid to B & O, (5) the planned rehabilitation program and coordinations will result in relatively large savings in operating expenses and in a financially stronger B & O, (6) the transaction will not result in a substantial diversion of traffic from the New York Central or any other railroad, and (7) C & O does not presently control or have the power to control B & O. Other exceptions relate to the examiner's alleged failure (1) to recognize the necessity for a finding of "a clear and strong showing of public gain" as a prerequisite to approval of the transaction, (2) to consider the total adverse effect upon railroad employees, their families, and the communities in which they live, (3) to conclude that the transaction will weaken B & O's financial condition, and (4) to give more comprehensive consideration to the record.

In addition, the association excepts to the failure of the report to impose the so-called attrition conditions. Among other things, it excepts to condition 11(d) of the recommended conditions in limiting the protective period to 4 years from the effective date of the Commission's order, and to the failure of the recommended condition to provide protection to employees against the payment of inflated prices for new homes.

On exceptions, the applicant and B & O contend that the recommended conditions are different from any conditions heretofore im-

posed by this Commission and therefore are not settled and may be the subject of extended litigation. In addition, they object to the examiner's statement that the applicant is willing to accept conditions for the protection of B & O's employees who will be adversely affected by the proposed capital expenditure program. Alleged differences from prior conditions include (1) a restriction against compelling an employee to change his place of residence, (2) a provision with respect to the burden of proof in the arbitration clause, and (3) specific protection for employees as a result of a rearrangement of forces in anticipation of the proposed transaction. The Maryland interveners except to the examiner's statement as to their position in the proceedings in that he failed to spell out the terms of an agreement entered into between the Maryland Port Authority, the C & O, and B & O on May 26, 1962.

Facts relating to B & O's car supply and its deferred maintenance are set forth in detail in appendix I hereof. One of the exceptants contends that B & O's car supply is generally adequate, pointing out that during the period 1956 through 1960, B & O net per diem debit averaged only $900,000 a year and that during the first 3 months of 1961, B & O did not use the cars offered to it by C & O. The record here shows that of 86,181 cars owned by B & O on December 31, 1960, 22,075, or over one-fourth, were in bad order, 9,684 were obsolete, and the service life of 41,478 cars had expired. The condition of B & O's open-top hopper cars was described by the witness testimony to be worse than average. As of December 31, 1960, 35 percent of its 41,419 open-top hopper cars were in bad order. In the 12-month period ended August 31, 1960, unrepaired bad-order cars averaged about 1,000 a month, an exceptionally high percentage. By using or attempting to use 50,000 cars which should have been retired, B & O incurred an additional annual maintenance expense of $8 million in the last 3 years. There is no testimony or other information of record to show how the average per diem debit of $900,000 was computed. In this connection, Schedule 376, Hire of Freight Cars, in B & O's Form A Annual Reports for 1956 through 1960 on file with this Commission show the following:

Hire of freight cars

(B & O)

Year	Amount receivable (credit)	Amount payable (debit)	Net amount payable (debit)
1960	$34,772,534	$52,337,817	$17,565,283
1959	34,133,318	45,174,897	11,041,579
1958	31,788,920	41,777,087	9,988,167
1957	44,338,208	54,370,619	10,032,411
1956	43,232,450	49,297,698	6,065,248
Total	188,265,430	242,958,118	54,692,688
5-year average, 1956-60			10,938,537

The net amount payable for each year shown in the above table is the amount shown in Account 536, Hire of Freight Cars—Debit Balance, in Schedule 300, Income Account, in the respective Form A Annual Reports. Thus, the evidence strongly indicates that in recent years B & O has made substantial use of foreign-line cars.

The net amount payable by B & O reflected in the table above contrasts with the net amount receivable by applicant from hire of freight cars during the same period as shown in the following table and compiled from applicant's Form A Annual Reports.

Hire of freight cars

(Applicant)

Year	Amount receivable (credit)	Amount payable (debit)	Net amount receivable (credit)
1960	$32,291,192	$26,724,791	$5,566,401
1959	34,187,908	27,728,102	6,459,806
1958	23,757,292	19,385,458	4,371,834
1957	37,762,057	31,564,048	6,198,009
1956	33,687,918	25,172,711	8,515,207
Total	161,686,367	130,575,110	31,111,257
5-year average 1956–60			6,222,251

With respect to deferred maintenance, it is contended on exceptions that during the years 1958 through 1960 B & O spent approximately $4.1 million more for maintenance than C & O and thus there is no justification for additional expenditures during the next 5 years. The fallacy of this contention is readily apparent by comparing the expenditures of the two carriers for roadway improvements during the last decade and longer. B & O has 5,910 miles of road as compared with C & O's 5,091 miles. Between 1946 and 1960, C & O spent approximately $759 million for additions and betterments and over $1.0 billion for maintenance of its roadway. In addition to these heavy expenditures, C & O spent $5.3 million more than B & O during the years 1949 through 1959 for track and roadway improvements. During the period 1949 through 1959, C & O spent $571 million for additions and betterments as compared with $302 million by B & O. Moreover, because of B & O's financial stringency in rectn years, many of its improvement projects were never completed. Thus, the benefits of the money spent by B & O could not be fully realized because the work was not finished. Because of a number of substandard locations on B & O's line, funds that would ordinarily have been used to maintain its entire right-of-way were diverted for repair and maintenance work at the most critical points. As a result of this policy, B & O has been forced to neglect its normal overall maintenance program. From 1946 to the present, B & O's financial

policy with respect to plant modernization has been in direct contrast to that pursued by C & O. During World War II and subsequent years, B & O has used its surplus earnings primarily for debt reduction, thus making it impossible to concentrate on plant improvement. We agree with the examiner's conclusion that B & O's car supply is inadequate and that it has considerable deferred maintenance. The record clearly supports the conclusion that B & O's properties are in dire need of rehabilitation.

Annual savings from consolidations to be effected by C & O and B & O in five specific areas, and the net cash requirements to achieve such savings, including the added cost of labor protection, were estimated on two different bases, depending on whether the carriers could file consolidated income tax returns. See appendix I hereto. On the basis of consolidated tax returns, the coordinations would result in estimated annual savings during the first 5 years of $13,380,973. On the assumption that the carriers will file separate tax returns, the annual savings would approximate $13,140,843.

In addition to the specific coordinations proposed, applicant proposes to help B & O with a 5-year program of building and repairing freight cars, improving freight yards at various places, improving tunnel clearances, modernization or construction of coal- and ore-handling facilities at specified points, installation of traffic control systems at various locations, and improvements to track and bridge structures, roadway machinery, and system servicing facilities. Operating officials of both railroads made an extensive study of B & O's requirements. Among other things, the principal operating officers of C & O inspected 4,531 miles of B & O line by train and 1,671 miles by inspection car. Mechanical officers of C & O visited all B & O shops and repair facilities to gain first-hand information with respect to the physical and mechanical condition of B & O's property and equipment. As a result of this study, it was found that B & O's most critical problem is the inadequacy of its car fleet, the conditions of which are described in appendix I. The solution to this problem requires the upgrading of B & O's fleet and reducing the number of high-maintenance and overage cars. Instead of its present fleet of 83,000 cars in poor average condition, it is expected that B & O will have a fleet of approximately 72,000 cars in good condition. Over a 5-year period, C & O proposes that B & O (1) retire 42,060 of its cars, all of which, except those in the 50-ton hopper category, are over 25 years old; (2) provide heavy repairs to 9,102 cars, principally hoppers, at a total cost of approximately $37 million; and (3) build 18,251 cars at a total gross cost of approximately $130 million, subject to an estimated credit of $23.5 million for the salvage

value of retired cars. After adding $1.3 million for related miscellaneous improvements in mechanical facilities and $32 million for cars destroyed or retired, the estimated total cost of this portion of the 5-year program is in excess of $176 million or $35 million a year.

The carriers estimate that during the 5-year period savings in maintenance of freight car expenses would be $30 million and saving in per diem expenses would be $15 million. At the end of the 5-year program, it is estimated that B & O's savings from the restoration of its car fleet will exceed $18 million annually as a result of reducing its annual freight car maintenance expense by $12 million and its annual per diem expense by $6 million.

Four yards at Baltimore (Curtis Bay), Cumberland, Md., and Grafton and Fairmont, W. Va., would be improved and modernized at a cost of about $7.5 million during the 5-year period. Another part of the plan involves the enlargement of tunnel clearances on the Baltimore-Philadelphia segment of the B & O and on its Parkersburg subdivision, at a cost of about $6.4 million, in order to accommodate the clearance requirements of present-day equipment. Coal-handling facilities at Baltimore (Curtis Bay) and Rochester (Charlotte Dock), N.Y., and the ore-handling facilities at Lake Erie would be completely modernized. These improvements are expected to require cash outlays of $11.4 million over the 5-year period.

Another area which requires particular attention is B & O's traffic control systems. C & O proposes the installation of eight centralized traffic control projects on 837 miles of B & O's road, requiring an expenditure of $8.8 million. Nine specific projects of work on tracks, bridges, roadway machinery, and other facilities would cost $21 million. Included in these projects are the reconstruction of bridges, the installation of hotbox detectors, and the provision for modern and efficient equipment for mechanized maintenance of way. As part of C & O's plan to bring B & O up to an acceptable standard of maintenance, about 40,000 tons of new rail, 615,000 crossties, and 800,000 cubic yards of ballast would be laid each year over the 5-year period. The estimated cost of the roadway capital projects is $55,117,880, and the estimated cost of freight car rehabilitation program is $176,885,696. Thus, the total cost of the entire modernization program over the 5-year period would be $232 million. After charging 5-percent interest on invested capital, it is estimated that net savings of over $45 million will be effected during the 5-year period. A summary of the cost of the described capital improvements program and the savings therefrom during the 5-year period is set forth below:

Summary of improvement program, first 5 years

Year	Net cash outlay—mechanical and roadway	Estimated saving	5-percent interest	Net saving
1st	$30,281,127	$2,292,400	$1,257,028	$1,035,372
2d	53,186,208	7,849,839	3,843,564	4,006,275
3d	47,948,023	14,728,981	6,371,772	8,357,209
4th	11,972,607	23,191,025	8,619,788	14,571,237
5th	38,621,315	27,885,517	10,651,641	17,198,876
5-year total	232,003,576	75,895,753	30,726,793	45,168,960

Upon completion of the capital improvement and coordination programs, the carriers estimate that gross annual savings will approximate $44 million, as follows:

Coordination program	$13,058,849
Roadway capital projects	1,721,094
Equipment projects	18,089,000
Roadway maintenance	1,000,000
Total	43,868,943

After deducting depreciation of $2.2 million on the additional investment in roadway property and equipment and deducting $11.6 million for interest at the rate of 5 percent on the total capital investment, the total annual savings from the capital improvement and coordination programs would amount to about $30 million annually after the fifth year.

Exceptants challenge the validity of the estimated savings on various grounds. Among other things, it is contended that the examiner erred in failing to give effect to the additional expenses that will be required to produce the savings. It is asserted that while the freight car rehabilitation program is estimated to produce savings of $30 million in freight car maintenance expenses in the 5-year period, major car repairs will cost $37,405,000, thus producing an increase in expenses of $7,405,000 instead of a savings. Similarly, it is claimed that the estimated savings in per diem expense of $15 million during the next 5 years and $6 million a year thereafter would be more than offset by the cost of the repair program and by B & O's commitment to pay an annual rental of $7,500,000 a year for 7,500 C & O surplus cars. It is further contended that the effect of the improvement program during the 5-year period will decrease B & O's net income by $15.5 million and result in a net decrease in its working capital of approximately $171.8 million. In brief, exceptants claim that with the increase in costs to B & O, its financial condition will become weaker and it will be unable to survive.

It must be recognized that the savings to be achieved through the proposed coordinations are separate and distinct from those that will

result from the proposed rehabilitation program. Annual savings from coordinations will occur in the relatively near future, whereas several years may elapse before substantial savings from the rehabilitation program will be realized. Obviously, large expenditures must be made to complete the capital improvement program and only meager, if any, savings can be realized from the program until after the improvements have been made.

The record shows that the coordination program and the roadway and equipment projects will produce savings for B & O in the first 5 years of $16.3 million after payment of approximately $37.4 million for major car repairs. Without these savings B & O's net income over the 5-year period would decrease approximately $31.8 million. Moreover, because of the poor condition of B & O's roadway and equipment, a major rehabilitation program must be completed to reduce maintenance expenses. Unless maintenance expenses are reduced, B & O will be in no position to increase its earnings. In connection with the aforementioned net decrease in B & O's working capital of $171.8 million, in arriving at that amount the cost of equipment and roadway additions and betterments totaling $248.3 million have been included as a cash expenditure without the benefit of any new funds (other than depreciation, retirements charged to income, and salvage benefits) to be provided. With a program of such magnitude, the apparent need is for long-term capital. Whether B & O will issue securities with applicant's guaranties, or whatever vehicle of financing is employed, it would appear reasonable to assume that the entire amount would not be repayable in 5 years. Therefore, it appears reasonable to assume that the only material effect on B & O's working capital position will be the expenditure of funds for installment payments on new obligations incurred in connection with the rehabilitation program. Nor does it appear that the car leasing agreement between B & O and C & O will directly affect the anticipated savings. The lease expires on December 31, 1962, and is renewable thereafter on a yearly basis. It was never intended to be a permanent solution to B & O's car supply problem. As the car repair program progresses, it is reasonable to expect that the lease agreement will be terminated and the expenses incident thereto eliminated. Similarly, as newly repaired cars are added to B & O's car fleet, savings in per diem for the use of foreign cars will increase.

While there may be some doubt as to whether the anticipated savings from the capital improvement program will be fully realized, we believe that the savings from the proposed coordinations are generally attainable. Certain details of the savings resulting from the planned coordinations and the cash outlay required to effect such coordinations are set forth in appendix I. These results are fairly con-

servative and thoroughly documented in the record. It is our opinion that the car leasing agreement between C & O and B & O will have very little effect upon the anticipated savings from the pooling of equipment. When the pooling arrangement becomes effective and newly repaired cars become available, the need for cars under the lease agreement will gradually diminish. Any effect that the car leasing agreement would have upon the coordination savings would be of short duration. As indicated, most of the savings from the coordinations can be realized in the near future.

This record does not support exceptants' contention that the cost of the proposed rehabilitation program would seriously weaken B & O's financial position. On the contrary, the restoration of B & O's properties should strengthen its overall condition. New avenues for traffic will open up by reason of the widening and raising of its tunnels, enabling it, among other things, to compete more effectively with private carriage, for-hire motor carriage, and bargelines through the use of piggyback and larger freight cars. Operating expenses will be reduced by the coordination of duplicate facilities, the consolidation of offices, and the pooling of equipment with C & O. The efficiency of B & O's operations will be increased as a result of improvements in its track, road bed, and signal system. By the elimination of unnecessary expenses, B & O's capacity to increase its earnings will be greatly enhanced. All of these factors strongly support the conclusion that B & O's financial condition will ultimately be strengthened as a result of the proposed modernization program.

The record clearly reflects the complete inability of B & O by itself to improve its financial position. Its current liabilities exceeded its current assets by $24.4 million at the beginning of 1962. Any earnings which B & O may generate in the next few years will be consumed by its urgent requirements for improvements and maintenance expenditures and for servicing its long-term debt. It has practically no unencumbered assets to offer as security for long-term loans. In 1961, B & O's operations produced the largest net loss in the carrier's history. It owes a bank note of $15,350,000, which was due May 31, 1962, and was extended to the end of 1962. In addition, around $23 million of long-term debt becomes due in 1965. Its present precarious financial condition has been accumulating over the years and is not a condition that suddenly occurred. Exceptants claim that even if B & O is in need of financial aid, there is nothing in the record to show that C & O is committed or in what manner it is committed to furnish any sort of financial assistance to B & O. Various possible methods of assisting B & O were outlined in the record. C & O indicated that some new equipment could be financed by it either by conventional equipment trusts or conditional sales agreements. It was

also indicated that the major car repair program and portions of the capital improvement program might be financed via wholly owned subsidiaries of either B & O or C & O. Because of its credit standing, C & O could assist B & O by the purchase of properties and securities of B & O or by the guarantee of B & O's debts. Unquestionably, C & O has the financial strength to aid B & O. As pointed out by the applicant and B & O in their reply, the best possible assurance of assistance to B & O is C & O's economic self-interest in the transaction and its agreement with B & O to merge as soon as practicable.

In addition, the record here shows that prior to the proposed transaction, C & O determined that large expenditures would be required to effect the rehabilitation of B & O's properties. It considered the effect that the rendition of the required financial assistance to B & O would have on its dividend record and overall financial position. C & O was fully aware of B & O's financial condition and its needs. Under these circumstances, it would be wholly unrealistic for C & O to invest so substantially in B & O unless it fully intended to provide the financial support necessary for B & O's rehabilitation. In order to protect its interests, C & O has no alternative but to assist B & O as much as possible in the proposed rehabilitation program.

During the course of the hearing all carriers parties to these proceedings except Central withdrew their opposition to the applicant's proposal, and, as previously indicated, Central withdrew after the hearings herein were closed. Notwithstanding Central's withdrawal from these proceedings, the effect of the proposed transaction on the operations and traffic of Central and other carriers is an issue to be considered. At the hearings, Central introduced a traffic divertibility study purporting to show that the C & O-B & O combination would divert 41 percent of its traffic. The applicant and B & O presented separate studies to show that little or no diversion would be effected. The results of each of these studies and the methods used therein are shown in appendix I.

On exceptions, it is contended that the C & O-B & O divertibility studies are deficient because they assume the continuance of the *status quo* of traffic relationships, traffic patterns, and rate structures. Among other things, the C & O-B & O studies are criticized for excluding so-called national account traffic and traffic for which there is no presently published joint C & O-B & O routes. Additionally, the studies are said to be defective in concluding that neither C & O nor B & O can influence the routing of traffic in situations in which either C & O or B & O is presently being short hauled by Central. While admitting that the volume of traffic diversion cannot be determined with mathematical precision, the exceptants suggest that the best estimate of traffic loss lies somewhere between the extreme diver-

gent claims of Central and C & O-B & O. They contend that any substantial decline in Central's revenues would jeopardize its ability to continue providing adequate transportation service.

In their reply to exceptions, C & O and B & O contend that Central's divertibility study is meaningless because of the underlying assumptions on which it was based. As shown in appendix I, Central's study assumes overwhelming financial strength of the C & O-B & O system and a cumulative deterioration of Central, including inferior service and rate disadvantages. Under these circumstances, Central's traffic would be vulnerable if the C & O-B & O system had feasible alternative routes or could establish such alternative routes.

Beneficial as the affiliation here proposed may be, there is no basis for assuming that a unified C & O-B & O system of overwhelming financial strength will develop within the immediate foreseeable future. Nor is there any basis for the assumption that Central's position in the railroad industry will deteriorate to any appreciable extent. There is no evidence indicating that Central or any other carrier would be unable to meet the rates of C & O-B & O. It is physically larger than any other railroad in the East, and with its $546 million of freight revenues, it is the second largest rail carrier in the production of freight revenues. As presently constituted, Central would not be significantly smaller than a unified C & O-B & O system. Because the assumptions indulged in by Central are highly speculative, its divertibility study has little probative value. The existence of joint C & O-B & O routes, or the possibility that such routes could be established, would not *per se* present a serious competitive threat to Central. Other factors, even more significant than the existence of alternative routes, that directly affect the routing of traffic include the locations of shippers and receivers, their service needs, their equipment requirements, and other practical traffic considerations.

Among other things, C & O and B & O conclude that traffic interchanged with Central is nondivertible where the effect of the interchange is to short-haul either C & O or B & O. Exceptants challenge this conclusion. As pointed out by C & O, it has routes on coal from all of its origin points to all C & O destination points in Michigan via Toledo, Ohio. Nevertheless, Central is presently taking over a substantial number of its coal cars at such short-haul junctions as Columbus and Cincinnati, Ohio. Thus, C & O contends that it has exhausted its ability to obtain its maximum haul; that if it could influence the routing of traffic, it would not presently be short-hauled by Central; that it cannot do for B & O what it cannot do for itself; and that, therefore, it could not effect the diversion of such traffic to B & O. Although the foregoing illustration is by no means conclu-

sive, it demonstrates an important traffic area in which C & O is unable to influence the routing for its own benefit. Under the circumstances, it would be unreasonable to conclude that C & O would be able to substitute B & O for Central when it has not been able to achieve that result for itself.

Equally untenable is the argument that shippers on Central's sidings would divert traffic to C & O or B & O team tracks. Much time, trouble, and expense would be involved in transferring traffic to and from their team tracks in lieu of using Central's existing industrial sidings. Moreover, most of the shipper witnesses testified that as a matter of policy they gave the line haul to the rail carriers on whose sidings they are located. As a matter of policy, national account traffic generally is allocated proportionately among the various competing railroads. It is highly doubtful that even a vigorous joint sales effort on the part of C & O and B & O could significantly change such policy to Central's detriment.

Both C & O and B & O will continue to maintain separate traffic departments. It is their contention that any attempt to divert traffic from Central would be self-defeating since Central would retaliate. The record is replete with testimony that it is generally the shipper or receiver, and not the railroad, who dictates the routing of traffic. Most of the shipper witnesses could foresee no circumstances under which their companies would divert traffic from Central, although some predicted diversion if Central's service drastically deteriorated. In addition, C & O indicated its willingness to accept conditions requiring the maintenance of existing routes and channels of trade similar to those prescribed in *Detroit, T. & I. R. Co. Control*, 275 I.C.C. 455. One of the conditions therein is the retention of jurisdiction by the Commission, permitting the reopening of the proceedings on a showing by an interested party that the conditions failed of their purpose.

We have carefully examined the estimates of traffic diversion submitted by Central and by C & O-B & O. They vary widely in their estimates of the amount of traffic subject to diversion and were prepared on different bases. In many respects they are not comparable. Based on these estimates, their background material, and other information of record, including particularly the effect of the transaction on the Nation's railroads and, in turn, on the public, we conclude that no undue amount of traffic will be diverted from Central. We have found from our past experience in similar proceedings that the diversion of traffic in the volume predicted rarely, if ever, occurs. Although we realize that at present Central is not well able to absorb any substantial loss of traffic, we believe that the benefit to the public from approval here will far outweigh the harm to Central. The

findings here specifically provide that interested parties may file applications for modifications of the routing and channels of trade conditions and this would be adequate to protect Central from all except ordinary traffic solicitation to which it is now exposed in the normal course of its business. We conclude that the prospective loss of revenues to Central is not such as to require disapproval here. On the other hand, as before indicated, by the widening and raising of its tunnels B & O will be able to utilize larger freight cars and offer piggyback service over more of its routes, and the improved service will enable it and C & O to compete more effectively for traffic now transported in private carriage, for-hire motor carriage, and barges.

The Port of New York Authority and the city of New York contend that the evidence shows that a C & O-B & O affiliation would divert traffic from the port of New York to the detriment of these interveners. They state that should the service now provided by Central decline as a consequence of this affiliation the public in the New York City metropolitan area will be deprived of essential service; that interveners will be affected by diversion of export-import traffic from New York to other north Atlantic ports, principally Baltimore; and that the port of New York can ill afford the additional handicap of declining rail service at that port in conjunction with allegedly disadvantageous differentials now the subject of litigation before the courts.

In view of our conclusion with respect to the effect of C & O-B & O affiliation on traffic now handled by Central, we do not believe that such affiliation will so adversely affect Central as to lessen its ability to serve adequately the New York metropolitan area, including the port of New York. Further, although C & O and B & O express an intent to improve the port of Baltimore, it is not clear at this point that there would be any substantial adverse effect on the port of New York. The latter port is recognized as the largest and best equipped north Atlantic port for the handling of general commodities. On the other hand, the traffic handled through Baltimore, and Newport News, which is served by the C & O, is pricipally bulk traffic. Any effect which C & O-B & O affiliation may have on the port of New York is conjectural and, in any event, it does not appear that it would be such as to warrant the prevention of improvement of the port of Baltimore to the detriment of the shipping public and the national defense.

In the past we have approved similar transactions if otherwise desirable in the public interest, notwithstanding the prospective loss of some revenues by competing carriers. We have withheld our approval, however, when the proposed transaction would seriously endanger or impair the operations of other carriers. *Chicago, B. &*

Q. R. Co. Control, 271 I.C.C. 63. On this record, there appears to be no reasonable basis for the conclusion that control of B & O by C & O would seriously affect the ability of Central or any other carrier to provide adequate transportation service to the public. It is important, however, that protection be provided for shippers and competing railroads to insure the maintenance of existing routes and channels of trade. To provide such protection, approval of the transaction will be made subject to the same conditions for the maintenance of existing routes and channels of trade as were prescribed in *Detroit, T. & I. R. Co. Control*, *supra*, with an additional condition, number 6, designed to preclude the closing of any existing route or channel of trade with any carrier on account of C & O's control of B & O. Applicant does not oppose these conditions, which are attached hereto as appendix VII.

As indicated, the association excepts to the examiner's conclusion that except for C & O's present ownership of 19 percent of B & O's voting stock, there is no other evidence of record that C & O controls or has the power to control B & O. It contends that C & O has already acquired approximately 23 percent of B & O's outstanding shares, that such acquisition by C & O constitutes illegal control and as such bars approval of the instant application. We have hereinbefore made reference to the fact that B & O has 599,998 shares of preferred stock and 2,546,941 shares of common stock outstanding in the hands of the public, or a total of 3,146,939 shares. Both B & O preferred and common stock are entitled to vote. As of March 8, 1961, C & O owned 578,875 shares of B & O common and 9,000 shares of B & O preferred, a total of 587,875 shares. This represents ownership by C & O of a little less than 19 percent of all outstanding B & O stock. Apparently, the association's computation was based solely upon the number of outstanding shares of B & O common stock and the number thereof which C & O purchased. It failed to include in its computation the outstanding shares of B & O preferred and the number of such shares which C & O purchased. Since both B & O preferred and common are entitled to vote, both classes of stock should have been included in the association's calculation to determine the actual percentage of stock which C & O presently owns for the purpose of measuring the quantum of control it exercises over B & O. As found by the examiner, Central and its subsidiaries, together with the Alleghany Corporation, own a little more than 20 percent of B & O's voting stock. Other individual stockholders or their nominees own a larger percentage of B & O voting stock than either Central or C & O. On the basis of this record, we conclude that C & O has not heretofore acquired control of B & O.

The association further contends that the proposed transaction cannot be approved unless it is established that it will result in a "clear and strong showing of public gain" and that no such showing has been made in this case. Under section 5(2), the test is whether the transaction will be "consistent with the public interest." In *Pacific Power & Light Co.* v. *Federal Power Commission*, 111 F. (2d) 1014, 1016, the court said that the "phrase 'consistent with the public interest' does not connote a public benefit to be derived or suggest the idea of a promotion of public interest." Instead, the "thought conveyed is merely one of compatibility." Similarly, we have consistently construed the phrase as meaning not contradictory or hostile to the public interest. See *Merchant's Dispatch, Inc.—Purchase—Smathers*, 25 M.C.C., 407, 409; *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 317 I.C.C.—, decided November 7, 1962, hereinafter referred to as the *Southern Control* case. As a condition of our approval, we may not impose a more burdensome requirement than that imposed by the statute. Nevertheless, we are of the opinion that the transaction here proposed will promote the public interest in helping to preserve and maintain an adequate transportation system.

The association takes the position that while the adverse effects upon employees is a sufficient basis for denial of the application, those effects, together with the adverse effects upon the families of employees, the communities in which they live, and upon the B & O and C & O virtually compel denial of the application. Applicant estimates that approximately 1,164 employees will be displaced by the coordinations and 730 will be deprived of employment; that on the basis of the average employment of both railroads in 1960 (59,863), less than 2 percent of the total average employment would be displaced; and that at the end of 5 years, 2,377 employees would be displaced as a result of the modernization program, but that during the 5-year modernization program 2,069 additional employees will be employed. Over the past decade, the financial condition of B & O has resulted in frequent and extended furloughs of many of its employees. Employment conditions on the C & O have been much better. In the long run, the C & O-B & O affiliation will undoubtedly provide more job security. We realize, however, that consummation of the transaction will cause a substantial hardship to a number of employees and their families, and to some extent adversely affect business conditions in their communities. But we are not persuaded that the application should be denied for this reason. As a result of the affiliation, B & O's ability to render an efficient transportation service on a sound financial basis will unquestionably be strengthened. It is our opinion that the advantages that will accrue

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to the B & O, the C & O, and ultimately to the general public will far outweigh the adverse employee effects which the unification will entail. As we stated in the *Southern Control* case, "it would not be in the public interest or compatible with the national transportation policy to deny the authority sought in order to prevent modernization of Central's [Central of Georgia] facilities and the possible loss of jobs incidental thereto." That statement is equally applicable here.

In order that hardships to employees may be alleviated, section 5(2)(f) makes it mandatory, as a condition to our approval of the transaction, that we impose fair and equitable conditions for the protection of the railroad employees affected.[6] In this case, there is a substantial difference of opinion between the carriers involved and the association as to the conditions which should be imposed. Both the association and the carriers except to the conditions recommended by the hearing examiner.

Although the association urges the imposition of the so-called attrition conditions,[7] it apparently would be willing to accept, as the statutory minimum, the conditions recommended by the hearing examiner, subject to modifications and additions set forth in its exceptions. Specifically, it excepts to the recommended conditions in limiting the protective period to 4 years from the effective date of our order and in failing to provide protection against the payment of inflated prices for the purchase of new homes. It requests an additional paragraph defining 1 month's pay to be computed by multiplying the daily rate of pay by 30, and it seeks a clarification in the dismissal allowance provision to make clear that an employee would not forfeit his dismissal allowance by reason of his refusal to accept a job which required a change of residence. These latter requested provisions are based upon language used in the Washington Agreement.

The C & O and B & O urge that, in lieu of the conditions recommended by the examiner, we impose the conditions prescribed in

[6] "(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. * * *"

[7] Under the attrition conditions, no employee of the carriers involved who was actively employed on the date of the filing of the application shall be deprived of employment or placed in a worse position with respect to compensation at any time during his employment because of the transaction or because of any program of economies resulting from a transaction.

New Orleans Union Passenger Terminal case, 282 I.C.C. 271, with some modifications which would provide a workable arbitration clause. We agree with the carriers that the recommended conditions are dissimilar in a number of respects from those heretofore imposed by us in unification proceedings.

Although the association concedes that under the decision of the United States Supreme Court in *Maintenance of Way Employees v. United States*, 366 U.S. 169, we are not required by statute to impose attrition conditions, it contends that the only fair method of protecting employees from the hardships of unemployment is by the imposition of such conditions. In the *Southern Control* case, we rejected a similar contention, citing as authority the decision in *Erie R. Co. Merger*, 312 I.C.C. 185, 196, in which it was stated:

> Assuming that we have the power to impose [attrition] conditions like those requested by the association, in our opinion, such action would not be consistent with the public interest. Conditions calculated to preserve unneeded jobs would unduly restrict the applicants in the establishment of most economical operations, would be wasteful, and would be in conflict with the objectives of the national transportation policy, under which we are enjoined to promote economical and efficient service and to foster sound economic conditions in transportation and among the several carriers.

For similar reasons, we conclude that the imposition of attrition conditions is not warranted on the basis of the record herein.[8]

Nor do we believe that the conditions requested by the association in its brief are required to afford the protection contemplated by the statute. Such conditions would broaden the scope of the protection heretofore provided by us and would increase the cost to the carriers. We find no merit in the contention of the association that protection should be provided employees of carriers other than the carriers involved in the transaction herein proposed. See *Baltimore & O. R. Co. Operation*, 261 I.C.C. 615, *Seaboard Air Line R. Co. Control*, 312 I.C.C. 507, and the *Southern Control* case. Similarly, protection

[8] In connection with this subject, it is noteworthy that the report of February 1962 of the Presidential Railroad Commission, appointed to consider and mediate certain specific issues between the major railroads and five brotherhoods representing operating employees, rejected a requirement of attrition as a means of protecting employees from the effect of technological changes. Among other things, the report states:

"This polite word, attrition, which means keeping all present employees, regardless of their usefulness, until the end of their working lives, conceals a number of vices.

"a. It means that many employees would devote their time and energy to tasks that need not be done. Such fruitless endeavor does not enhance to human personality. Its true objective is not to furnish employment but to furnish income to the employee whose skill has become superfluous and who has no opportunity for promotion or transfer to a useful task. It ought to be possible to achieve this legitimate end without degrading the employee.

"b. Attrition also means that the nation as a whole is deprived of useful service which potentially retrainable and productive employees coming under such a plan would otherwise render.

"c. Finally, attrition is a slow process. The rate of technological change is now so rapid that attrition alone may not have digested one change before we are caught up in another."

against the payment of inflated prices for new houses would place an onerous and unfair burden upon the carriers and from a practical standpoint such a provision would be too complex and controversial to administer.

It is our opinion that the protection afforded by the *New Orleans* conditions, as modified in the *Southern Control* case, *supra*, will more than meet the minimum requirements of section 5(2)(f). In effect, the *New Orleans* conditions superimpose upon the *Oklahoma* conditions (*Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177) the provisions of the Washington Agreement, the protection of the *Oklahoma* conditions to be applied as a minimum. As we stated in the *Southern Control* case, the *New Orleans* conditions "were imposed for the specific purpose of giving protection to those employees who knowingly were not to be adversely affected in their employment until a substantial period elapsed after the date of the order authorizing the transaction and who otherwise would have received little or no protection under the *Oklahoma* conditions." The conditions prescribed in the *Southern Control* case conform substantially to the *New Orleans* conditions, with a modification in the provision respecting the arbitration of disputes. In the *Southern Control* case, we adopted an arbitration clause which makes mandatory the submission to binding arbitration of disputes not settled by agreement between the carrier and the employee. The reasons for the adoption of the arbitration clause in its present form were set forth in the *Southern Control* case and need not here be restated or amplified. We specifically rejected as being inconsistent with arbitration procedure a provision relating to the burden of proof in the settlement of disputes referred to an arbitration committee.

As thus modified in the *Southern Control* case, the *New Orleans* conditions will be fair to the affected employees and to the carriers involved in the transaction. In the past, these conditions have been acceptable to employees as well as carriers. It is observed that many of the provisions specifically requested by the association are similar to, or based upon language used in the Washington Agreement. Of course, to the extent that the Washington Agreement becomes applicable, the terms and conditions thereof will apply.

The applicant takes the position that we are not authorized to provide protection for employees affected by the proposed capital improvement program. In considering a somewhat similar contention in the *Southern Control* case, we stated:

> If we approve the transaction, we are required by section 5(2)(f) to include terms and conditions providing that, for a prescribed period, the "transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment." In conformity therewith, conditions heretofore prescribed by us and those which

will be prescribed herein protect an employee "if as a result of" the particular transaction he is adversely affected in his employment. We may not by interpretation narrow the scope of the protection intended by the statute. Both the statute and the condition mean what is literally stated, i.e., that an employee is protected against adverse effects suffered in his employment as a result of the transaction. Questions as to whether adverse effects suffered by particular employees in their employment result from the transaction are questions of fact which can be determined under the circumstances of particular cases and must be left for the determination of the arbitrators in case of dispute.

Those remarks are equally applicable here.

We find that a fair and equitable arrangement for protecting the interests of the employees of the applicant and the B & O and any of their subsidiaries who may be adversely affected as a result of the transaction herein approved will be provided by imposing the conditions set forth in appendix VIII hereof. These conditions are the same as those imposed in the *Southern Control* case.

In their statement in lieu of exceptions, the Maryland interveners assert that the examiner did not adequately describe their position in the proceedings. They state that their support of the proposal herein was conditioned upon an agreement entered into by and between the C & O, the B & O, and the Maryland Port Authority on May 26, 1961, under which it was agreed, in part, that merger of the two carriers would be consummated as soon as practicable following consummation of the proposal herein. To state their position accurately, the Maryland interveners request that the following language be incorporated into our report:

B & O intervened in support of the applications. Applicant entered into an agreement and stipulation dated May 26, 1961, introduced as Counsel's Exhibit, with B & O and Maryland Port Authority, under the principal terms of which it was agreed (1) the period of stock control shall be no longer than necessary to permit merger of the C & O and B & O, (2) ultimate disposition of the stock of the Western Maryland Railway Company owned by the B & O and deposited in trust with the Chase Manhattan Bank, as voting trustee, will be reserved for resolution at a later date; (3) during the period of control both B & O and C & O will preserve the present rate relationships between Baltimore and Newport News to the extent they are within their control, and (4) appropriate recognition will be given both during control and after merger to the importance of Baltimore to the combined system.

Maryland Port Authority and Baltimore Chamber of Commerce intervened in support of the applications only as a necessary step to the accomplishment of a merger and stated that their support was conditioned upon full compliance by the railroads with the agreements and stipulations contained in the agreement. Also, numerous shippers appeared in support of the applications.

In addition, the Maryland interveners request that the terms of the agreement be included in our report as conditions to our approval of the transaction and that we reserve jurisdiction to reopen the proceedings for further hearing in the event that merger is unreasonably delayed.

The application here concerns only the control of the B & O by the C & O, although the carriers express an intent to merge at some time in the future. In *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298, the United States Supreme Court stated, at page 305:

> From the initial enactment in the Transportation Act of 1920, 41 Stat. 456, 480, to the most recent comprehensive re-examination of these provisions in the Transportation Act of 1940, 54 Stat. 898, 905, Congress has consistently and insistently denied the Interstate Commerce Commission the power to take the initiative in getting one railroad to turn over its properties to another railroad in return for assorted securities of the latter. The role of the Commission in this regard has traditionally been confined to approving or disapproving mergers proposed by the railroads to be merged.

It is clear that we cannot require the carriers to merge, either directly or indirectly by appending a condition, such as sought here, to an approval of the control transaction. In any event, it has not been shown that such a condition is required to make the transaction consistent with the public interest. Item (1), therefore, cannot appropriately be included as a condition. Item (2) is of no pertinency here. Items (3) and (4) to the extent they are not included in the conditions imposed for the maintenance of existing routes and channels of trade are not matters which should be considered in this proceeding.

The applicant's proposed acquisition of control of B & O comes within the scope of section 5(2) of the act, and its proposed issue of stock falls within the purview of section 20a. In passing upon proposed transactions under section 5(2), we are required by section 5(2)(c) to give weight, among other things, to (1) the effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion or failure to include other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of carrier employees affected. In administering these provisions, we are guided primarily by consideration of the adequacy of transportation service, of its essential conditions of economy and efficiency, and of appropriate provision and best use of transportation facilities. *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 25.

The record establishes that B & O's properties are in poor physical condition. It has considerable deferred maintenance, and a large percentage of its freight cars is either obsolete or in need of repair. Its serviceable freight cars are in short supply and its motive power equipment is inadequate. B & O's properties need to be rehabilitated in order that its operating expenses can be reduced and its earnings increased. Unless major improvements of B & O's properties are undertaken immediately, its ability to compete with other railroads

and other modes of transportation will be seriously jeopardized. All temporary expedients to effect economies and promote efficiency appear to have been exhausted. Its failure to survive would deal a heavy blow to the shipping public in the 13 States and the District of Columbia within which it now operates and compound the inconvenience of travelers by elimination of its already greatly curtailed passenger service. It must have the infusion of new credit from outside. Under affiliation C & O is willing and can provide the financial assistance needed to restore the B & O's properties to essential standards. This is not a temporary palliative but an effort of the railroads themselves to work out their long-range problems. Through the use of joint facilities and personnel and the pooling of equipment, substantial cost reductions and savings can be effected. Further, the legitimate interests of B & O's creditors and equity holders will be served by C & O control. As a result of the affiliation, B & O will eventually become a stronger railroad and the efficiency and economy of its operations will be increased. Strengthened as a result of the control, B & O's ability to meet adequately the needs of commerce and of the national defense will be enhanced. These take on added significance when we view the large industrial and population centers served by the B & O in 13 States and the District of Columbia. Such needs are vitally affected by the condition of its roadbed and related facilities such as tunnels, bridges, et cetera, as well as the condition of the freight cars and engines, and the efficacy of other transportation services which the B & O may be able to provide and, in the case of national emergency, on short notice. We dare not ignore the threatening world situation. We consider that our approval herein will result in a financial strengthening of B & O and permit it to make improvements necessary to meet adequately the transportation service which it may reasonably be expected to provide. The needs of commerce and of national defense are of paramount importance to the country.

C & O also stands to benefit from the transaction. Although C & O is relatively strong financially, the proposal will allow it to diversify both in traffic and in territory, so as to remain financially sound. As to traffic, B & O has more merchandise traffic than C & O and the coals transported by the two carriers are more complementary than competitive. As to territory, B & O serves a number of major industrial centers and ports not served by C & O, and thus the affiliation will create new opportunitites for C & O. In addition, it provides C & O with an opportunity to invest its surplus funds in another carrier that has potentiality for future growth and better service for the public.

Since the lines of the two carriers generally are complementary, there will be no material lessening of competition between the C & O and B & O. No other rail carrier will be placed at such a competitive disadvantage or otherwise unduly affected as a result of the transaction as to warrant disapproval. No other carrier has asked to be included in the transaction and there is no evidence of record showing that the public interest requires the inclusion of any other carrier.

Although the carriers participating in a transaction subject to section 5(2) are specifically relieved under section 5(11) from the operation of the antitrust laws, we are required, in our determination, to give consideration to the effect of the control on competitors and on the general competitive situation in the industry in the light of the objectives of the national transportation policy. *McLean Trucking Co. v. United States*, 321 U.S. 67, 87. Thus, we must estimate the scope and appraise the effects of curtailment of competition which will result from the proposed control and consider them along with the advantages of improved service, safer operation, lower costs, et cetera, to determine whether the control will assist in effectuating the overall transportation policy. Suffice it to say that we have herein considered and discussed the referred to factors and we conclude that the control will assist in effectuating the overall transportation policy.

With respect to the reasonableness of the exchange offer, it should be pointed out that the proposal herein involves only the control of B & O. It is unlike a merger in which minority stockholders are bound by the decision of the majority. B & O stockholders were accorded ample opportunity to accept or reject the offer. Although all B & O stockholders were undoubtedly aware of these proceedings, Central was the only stockholder who intervened in opposition, and it ultimately changed its position by withdrawing from the case. The majority of both C & O and B & O stockholders as well as the managements and directorates of both carriers approved the exchange offer. In the light of these considerations and the specific factors upon which the exchange ratios were based, including B & O's present financial condition, we are of the opinion that the stock exchange ratios are just and reasonable.

The proposed acquisition of B & O stock will not result in an increase in the total fixed charges of either carrier, or in the assumption of guarantee of fixed charges by either carrier. Except to the extent that C & O has agreed to accrue for B & O assenting stockholders for a period of 1 year the difference in dividends they receive as B & O stockholders and what they would receive as C & O stockholders pending consummation of the transaction herein, there is no guarantee of the payment of dividends on the part of either carrier. In view of C & O's general financial condition and the short

duration during which such dividends are to be accrued, it is our opinion that this feature of the transaction will not jeopardize the rights of C & O stockholders or impose an undue financial burden on C & O. Accordingly, we conclude that the dividend-accrual feature of this transaction is reasonable and will not be inconsistent with the public interest. In our judgment, the record warrants the conclusion that the proposed transactions will be beneficial to the public.

We find that the proposed transactions meet the requirements prescribed by sections 5(2) and 20a and conform generally with the purposes and objectives of the national transportation policy declared by Congress. We are convinced that the proposed transactions should be approved.

Exceptions and arguments not specifically discussed herein have been considered and found to be without merit.

Subject to (*a*) the conditions for the protection of employees set forth in appendix VIII hereof, and (*b*) conditions for the maintenance of existing routes and channels of trade set forth in appendix VII hereof, we find that (1) the acquisition by The Chesapeake and Ohio Railway Company of direct control through ownership of capital stock of the Baltimore and Ohio Railroad Company and, indirectly thereby, the common-carrier subsidiaries controlled by the latter, as proposed, is a transaction within the scope of section 5(2) of the Interstate Commerce Act; that the terms and conditions proposed are just and reasonable; and that approval of the transaction will be consistent with the public interest; and (2) the proposed issue by The Chesapeake and Ohio Railway Company of not exceeding 2,055,398 shares of its authorized but unissued common stock in exchange for capital stock of The Baltimore and Ohio Railroad Company is (*a*) for a lawful object within its corporate purposes and compatible with the public interest, which is necesary or appropriate for or consistent with the proper performance by it of service to the public as a common carrier, and which will not impair its ability to perform that service, and (*b*) is reasonably necessary and appropriate for such purposes.

An appropriate order will be entered.

COMMISSIONER HUTCHINSON concurs in the result.

COMMISSIONER TUCKER, whom COMMISSIONER WEBB joins, dissenting:

I do not agree that these applications should be approved on this record at this time. The policies, both procedural and substantive, which we employ in this case must be tailored to the fact that the eastern railroads are proposing to reshape themselves into three giant new systems carrying practically all of the rail tonnage moving in

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the eastern territory. A sound and comprehensive approach to this situation cannot, in my view, permit the isolation of this decision. The majority, by drawing a curtain around this case, has endorsed the so-called case-by-case approach. My disagreement is not only with this course of procedure and its policy implications, but with the analysis or evaluation of this record which is alleged to warrant a decision herein at this time.

I must say at the outset that I do not find the concept of an *appropriate* C & O-B & O alignment, in and of itself, alarming. My concern is in measuring the exact nature of this specific proposal and its obvious effects on other railroads to ascertain consistency with the real interest of the public. My conclusion is that this proposal should be consolidated for decisional purposes with the PRR-NYC and N & W-Nickel Plate merger cases.

It has been suggested that consolidation for decisional purposes would violate procedural due process. I do not advocate any Peeping Tom type of adjudication in which the rights of a party would be determined by surreptitious evaluation of the record made in a proceeding in which that party did not participate. However, if the Commission were to view the unfolding eastern rail scene in its entirety, it might be able to conclude that the record made in each of the separate cases warrants the necesary public interest findings and that such findings could be made either in a consolidated report or in reports served simultaneously. On the other hand, if a comprehensive view of the proposed rail realignments in the East should require a reopening of the record in any individual case, or a limited further hearing on a consolidated record, I am confident that the Commission has sufficient control over its own procedures to prevent any unreasonable delay.

The major points of my disagreement with the majority are:

1. That the B & O's financial condition does not require an immediate decision on this proposal when balanced against other public interest factors;

2. That we are in no position on this record to ascertain what C & O will actually do to help B & O;

3. That the real problem in this case is that there is a very definite threat of traffic diversion and serious injury to other railroads under the present railroad alignment although this situation may change depending upon our disposition of the major pending eastern mergers;

4. That there is a real danger of prejudging the subsequent decisions in the two major pending eastern mergers.

I am fully aware that any view which contemplates delaying a promised program of physical and financial rehabilitation of the B & O is of great consequence and thus must be premised upon careful analysis of the record. Such an analysis requires study of the proposal in its proper context within the framework of our overall

national transportation situation and in relation to the existing economic climate as it affects other railroads as well as the B & O.

The past decade has witnessed a mounting awareness of transportation problems which can affect the lifeblood of the American economy. Our common carrier system, which long has been regarded as the fundamental component of a healthy and effective transport network, has experienced an increasing diversion of freight and passenger traffic to private carriage. The gravity of this dangerous trend far transcends the problems of any particular mode and, while motor carriers, railroads, water carriers, and airlines do not suffer from the same ills nor require the same remedies, it now has become more generally accepted that Federal policy and action cannot foster a sound and effective transportation system unless specific decisions and legislation are formulated and coordinated in harmony with a general transportation philosophy. This philosophy must be directed toward the establishment and growth of an economical, adequate, and efficient transportation system. Our transportation resources not only must be able to meet the demands of a growing and dynamic economy, but must also stimulate further economic expansion.

Seldom has any single problem of the American economy received so much attention from so many sources with so few results. The continual deluge of measures and countermeasures to improve present Federal policy and transportation operations have inundated Government officials and the industry alike. Although these proposals have become the center of much controversy as radical departures from past legislation, one basic fact should not become obscured—they are directed to provide for the continued existence of a healthy common carrier system under private ownership and management.

No reasonable man would dispute the fact that this Nation's railroads have moved into an era where they are now faced with very real and serious problems. Competition from other modes has made inroads into traffic that the railroads formerly carried. The railroads' relative share of freight traffic has dwindled and, in fact, for some lines there has been an absolute decline in tonnage, despite the increased demand for transportation that has been generated by economic expansion. Current rail passenger problems have been so publicized that further discussion is unnecessary. While the underlying causes and present state of these problems have been debated extensively, it is an obvious fact that while this country has been favored with prosperity and increasing economic activity, the transportation industry has not shared proportionately in this growth as added private and public expenditures have been allocated more for services

than transportable goods. The increased demand for transportation, which has been generated, has failed to provide substantially larger volumes of freight suitable for railroad transportation.

Today, the eastern railroads, in particular, are walking a financial tightrope while attempting to balance declining profits with the mounting burdens of surplus capacity. The elimination of unneeded duplicate facilities and services, today as never before, seems imperative if operating expenses are to be cut back to those levels where railroad management can offer more modern equipment and operations. Such a cutback is necessary to improve desired services for maintaining present traffic levels and obtaining new traffic.

Under existing conditions, soundly conceived and soundly implemented railroad consolidations present one possible method of assisting the development of a more adequate rail system. The Commission is currently confronted with merger or control applications involving two-thirds of the total class I railroad assets in the country and the Commission's basic responsibility for safeguarding the public interest must not in any way be obscured despite any urgency of the situation. Because of the extensive consolidation proposals now before us, our decisions, irrespective of their nature, predetermine to a great degree the future of the American railroad system.

Notwithstanding the majority's opinion that there is no reason to compare the issues of this case and those of the N & W-Nickel Plate and PRR-Central merger cases, the unalterable fact remains that these three cases, whether considered separately or together, embrace all of the largest and strongest railroads in the East with over 80 percent of all railroad trackage and more than 90 percent of the rail freight in this area. The three proposed railroad systems, if approved, will provide, for the most part, the only substantial intramodal competition in most of the Eastern States. It is impossible to escape these facts by saying that this is just a control case and that a decision on actual merger of the two roads will be made at some time in the future. As a practical matter, this is a permanent alignment of the two railroads, and the Commission is, in effect, being called upon to take its first step toward approval of a far-reaching realignment of the eastern railroad system.

From the enactment of the Transportation Act of 1920, with its requirement that mergers be carried out under a master plan, through 1960, no proposals under section 5 of the act have approached the pending plans in impact upon the railroad industry or the public. Certainly the implications of the instant applications and the two other principal eastern proposals are without precedent in the history of this Commission. Never before has the Commission been placed in a position where the exercise of its guardianship of the public

interest has been so imperative. This Commission has been directed to consider whether proposed transactions "be consistent with the public interest." Our effort to ascertain the public interest thus becomes our first and paramount duty in this case. As one critic of independent commissions has noted:

> The independent commission cannot escape the search for the public interest if it has a sense of mission and a feeling of responsibility for carrying out the objectives of its statute. Nevertheless, the roadblocks in this search are formidable. The commission must ascertain the nature of the problem facing the public in a particular regulatory situation, and it must identify the means by which the goal of serving the public interest can be achieved with the least cost to the private parties affected consistent with its concept of the public interest.*

Eastern railroad problems must not be minimized. Prompt and positive action by the Commission has been urgently called for and no doubt is needed. But as Justice Holmes so succinctly said in his dissent in *Northern Securities Co.* v. *United States*, 193 U.S. 197, 400:

> Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Even though this statement has been frequently echoed, it seems particularly pertinent to our consideration of this record. The times may demand action but the inherent possibilities of undesirable consequences to the American public dictate that decisions be predicated on sound, economic facts, adequately presented and objectively analyzed. As soon as the search for the public interest, even seemingly, becomes a secondary consideration in cases involving more than the adjudication of private rights, no matter how conclusive the exigencies of the situation appear, the independent Commission is doomed to impotency as an instrument of government.

Section 5 of the act, like section 209(b), requires the Commission to approve the applications involved if approval "will be consistent with the public interest." This proceeding cannot be compared, of course, with a contract motor carrier application for a permit to transport frozen berries from a processing point to a distribution point for a named shipper. I do not mean to suggest that the majority has not devoted to the instant applications a great deal more time and thought than it has to more or less "run-of-the-mill" applications for motor contract carrier authority. In one vital sense, however, the Commission's consideration of the proposed transaction is essentially the same as that customarily accorded to an application

* Bernstein, Marver H., *Regulation Business by Independent Commission*, Princeton University Press, Princeton, N.J., 1955, p. 155.

filed under section 209(b). That is, in each instance, the Commission has been content to find consistency with the public interest solely within the confines of the particular isolated record which the parties themselves chose to place before it. An approach that is proper and practical with respect to individual contract carrier applications becomes sterile and stultifying when adapted to a proceeding of this magnitude.

In a narrow and literal sense, the transaction proposed is the control of the B & O by the C & O. What these parties actually propose, however, is to become one of three giant rail systems in the East. The proposed three-rail system in the East, together with merger negotiations and proposals involving other regions, presents one fundamental issue: What kind of railroad system should the present generation leave to the generations that follow? If there are any who maintain that only the owners are empowered to shape the devise, I need only say that the properties have been duly entailed, first by the States and later by the Interstate Commerce Act. The answer provided by the report to the realignment proposals seems to be that whatever the carriers prove to be good for themselves is good for the country; a view which may not be wholly lacking in merit. It may well be that any immediate improvement in the condition of a relatively sick area of the industry, however slight, will outweigh any possible benefit of case consolidation. The conclusion is tenable, however, only on the assumption that the evidence adduced by the parties does in fact reflect all facets of the public interest.

As a comparison of this expression with the report of the majority will show, much of the evidence adduced by the applicant and its supporting interveners is susceptible to varying interpretations. There can be little argument, however, concerning the general nature of the expert testimony upon which the finding of consistency with the public interest is grounded. That evidence consists essentially of impressive *post hoc* rationalizations prepared by a corps of engineers, economists, accountants, and traffic and financial experts employed or retained to justify a prior managerial decision. Neither the examiner nor any interested party to the proceeding, public or private, was endowed with the peculiar knowledge and the ample resources required to challenge evidence of this character. The question thus arises as to whether the necessary findings could have been made if the general public had been represented by members of the Commission's staff and by consultants retained by the Commission. We shall never know the answer to that question because the Commission's role in this proceeding has been passive from beginning to end. No such passive attitude existed half a century ago when the Commission retained Mr. (later Mr. Justice) Louis Brandeis as its special counsel

to represent the public in a general increase case. *The Five Per Cent Case*, 31 I.C.C. 351 (1914).

If these cases are not consolidated, no one will ever know what benefits, if any, might have been derived therefrom. Consolidation presupposes a more active role for the Commission than it has heretofore assumed; a greater confidence in the Commission in certain quarters than has heretofore existed; and a greater willingness to provide the Commission with the resources required to do a proper job. In short, the manner, method, and perspective employed by the Commission in meeting the problem of eastern railroad realignment will, in my view, go far toward determining the mission and success of the Commission in this and succeeding decades.

In any event, our judgment must be made here after a consideration of all the technical factors in the plan before us which may affect the development, coordination, and preservation of a national transportation system adequate to meet the needs of the commerce of the United States, the Postal Service, and of the national defense.

The "public interest" standard was interpreted by the Supreme Court in *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 25, as follows:

> the term "public interest" as thus used is not a concept without ascertainable criteria but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities • • •.

The 1940 act replaced previous provisions that consolidation proposals "will be in the public interest" [10] and that "the public interest will be promoted by the consolidation," [11] with this broader clause which merely requires that such proposals "be consistent with the public interest." [12] This change in language, though a movement away from the "strong showing of public gains" requirement described in *Control of Virginian Ry.*, 117 I.C.C. 67, 85, does not eliminate the public interest standard. Rather, the act requires that the sum total of the benefits and injuries of a particular application be consistent with the public interest.[13]

Together with the elements of the "public interest" criteria detailed in the *New York Central Securities Corp.* case, the Commission must consider, among other things such as public policies declared by the Congress, the four more specific tests of section 5(2)(c) enumerated

[10] Former section 5(2) of the Interstate Commerce Act, enacted as a part of the Transportation Act of 1920. February 28, 1920, ch. 91, § 407, 41 Stat. 481. Section 5(2)(b) of the Interstate Commerce Act now employs the criterion "consistent with the public interest."

[11] Former section 5(6) of the Interstate Commerce Act, enacted as a part of the Transportation Act of 1920. February 28, 1920, ch. 91, § 407, 41 Stat. 481. Also former section 5(4)(b) of the act, 48 Stat. 217 (1933).

[12] 54 Stat. 905 (1940), 49 U.S.C. § 5 par. 2(b) (1958).

[13] The majority has indicated that the results of the proposed control would satisfy even the more stringent tests of the 1920 act.

in the majority's report. Also implicit in any consideration under section 5 is the effect on competition which is an important though not the controlling criterion. See *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87, and *Louisville & N. R. Co. Merger*, 295 I.C.C. 457, 503. Finally, other factors, such as local and regional interests, may become major determinants in particular proceedings if they affect the development of an adequate, efficient, and economical transportation system.

Inasmuch as I disagree to a substantial extent with the majority's analysis of the record, a thorough factual discussion of each of the crucial issues must be undertaken so that the conclusions can be tested by facts.

Basically, this proposal can be broken down into the following issues. First, the present condition of the B & O must be analyzed to determine the necessary requirements of a rehabilitation program. Although the B & O's condition is a crucial weighing factor it is, in itself, not enough to warrant immediate approval of the control proposal unless the programs offered by control provide a definite remedy for the condition. Next, we must determine if the proposed programs will improve present transportation facilities and if these changes can reasonably be expected to occur.

It is necessary to reach a number of subsidiary conclusions to decide this control issue at this time. First, we must decide what the B & O's present situation is and what types of action are practicable. To demonstrate that specific programs are advantageous is not enough, we must also find that the improvements will be made *as a result of* the proposed corporate affiliation. Otherwise, the improvements, even though reasonably likely to occur, cannot be considered valid reasons for approving control. We must then weigh all the advantages of control at this time against the disadvantages not only to the B & O, and the C & O, and to other railroads, but more generally, to the public interest in our overall transportation system. The conclusions with respect to these components, in turn, play a fundamental part in deciding whether this proposal should be consolidated with the two merger cases.

The current posture of the B & O railroad has primary importance in this case because it determines the future requirements of that railroad and the improvements needed to create a profitable transportation operation; it is the only possible justification for the haste in which this application has been decided in the face of the many public interest considerations militating in favor of consolidating the three major "realignment" proposals for decision; and it, in general, exerts a pervasive influence on the emphasis which is placed on the public benefits and injuries discussed herein. Hence,

the state of B & O's present condition and requirements is the stepping stone to the discussion of the separate features of this case.

Proponents contend that B & O is in dire financial straits. They assert that immediate assistance cannot be postponed a day, as B & O suffered a net deficit of $31.3 million in 1961, and that without C & O assistance there can be little hope of improving B & O's distressed condition of 1961. The majority's decision is predicated upon substantial acceptance of these allegations.

In effect, the evaluation of B & O's condition establishes the milieu in which subsequent facts must be analyzed. While the majority has given weight to decreases in particular accounts in 1961, insufficient attention is given to the overall effects of the very significant writeoffs and the reclassifications and adjustments in particular accounts which were not actually related to B & O's 1961 operations. The net effect is an overemphasis of B & O's financial troubles in 1961. Among the items which contributed to B & O's poor financial showing but which were not wholly caused by its 1961 operations are the following:

1. Reduced carrying value of Reading Company stock	$26,000,000
2. Write-off of Staten Island Rapid Transit Railway Company Interline Balances prior to 1957 and 1960	5,712,805
3. Write-off of Claim for 1943 Taxes	442,000
4. Write-off of Uncollectable Bills including $40,504 for years 1933-1946	216,913
5. Write-off of Charges previously held in suspense	542,579
6. Write-off of amounts due Company Insurance Funds	984,981
7. Write-off of uncollected mortgage interest due from Staten Island Rapid Transit Railway Company	6,836,384
8. Write-off of investment advance to affiliate, Manor Real Estate Company	346,647
9. Write-off of disputed per diem	787,535
10. Elimination of item described as "adjustment of Payroll Account and Payroll Charges due to overlapping pay periods." This item was carried forward from 1960	4,232,591
11. Increase for Loss and Damage Reserves	1,654,782
12. Increase for Unpaid Invoices	493,721
13. Increase for Estimated Per Diem Charges	400,000
14. Increase for Overcharge Reserves	1,980,000
15. Net Reduction in investment advances	10,491,045
16. Other Taxes Accrued that are applicable to prior years	6,542,126
Total of Items 1 through 16	67,664,109

Items 1 through 10 represent 46.1 of the $99.3 million decrease in total assets. In addition, a new liability of $9.0 million was recorded in 1961 as a reserve for employees' vacation pay for 1962, as a result of union contracts and alterations in our accounting requirements. The net reduction in current assets for 1961 of $20.8 million includes

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items 2, 3, and 6 in addition to reclassifications of $2.2 million for estimated income taxes for 1951 through 1954 to deferred assets and a reclassification of about $0.5 million in AFE 33706, Dillon Dam and Reservoir, to deferred charges. These items represent over 47 percent of the total reduction.

The unfavorable car-service balance, $4.2 million for B & O in 1961, noted in the majority's report, was caused to a great extent by the writeoff of $5.7 million due from the Staten Island Rapid Transit Railway Company for the years prior to 1957 and 1960. The $15.3 million decrease in other assets and deferred charges includes a $12.6 million total of items 4, 5, 7, 8, and 10 and a $1.4 million reclassification from other assets to investments in affiliated companies for the purchase of 34 locomotives for the Buffalo, Rochester, and Pittsburgh Railway Company, to which B & O is a guarantor.

B & O's deficit working capital position in 1961 was traced principally to a $19.4 million increase in accrued accounts payable and an increase of $6.8 million in other taxes accrued. These accounts include the new vacation pay allowance liability and items 11, 12, 13, 14, and 16, which constitute about 70 percent of the increases. Furthermore, $2 million included in accrued accounts, payable for material invoices unpaid, would be offset by a charge to material and supplies, a current asset account.

The majority's report does not seem to take into consideration the fact that, notwithstanding our accounting requirements, B & O's equity in affiliated companies exceeded its investment therein by approximately $65 million on December 31, 1961. After making allowances for reductions in the market value, including other investments, B & O has an equity of about $49 million more than shown on its books.

Basically, there are very real dangers, therefore, in overemphasizing B & O's financial position in 1961, which was a particularly bad year for most of the eastern railroads. During this period, B & O's management also underwent a sweeping change that may have caused repercussions in policy and earnings. Prior to that time, B & O had maintained profitable operations although net income had been declining.

While the majority appears to be greatly impressed with B & O's misfortunes during the 12 months of 1961, there is no indication that they have given sufficient consideration to the most recent statement in the record by the B & O president that his railroad will operate in the black for 1962. It is stipulated that B & O's annual reports are to be considered part of the record, raising some question as to whether we should consider its quarterly reports for the first three quarters of 1962 on the merits of the control cases. Nevertheless, in the light of the generally favorable picture for 1962 projected

by the quarterly reports and the hopeful prediction by B & O's president with respect to its 1962 operations, I believe the majority will prove to be wrong in its bleak conclusions with respect to B & O's condition and thus wrong in not holding up a decision herein for case consolidation. Certainly, if the B & O, under new management, can overcome a considerable part of its deficit in a single year, the possibility of substantial earnings in the next few years would not seem remote. The revival of B & O's earning power was traced, according to its management, to a plan which incorporated efficient business principles and methods of operation aimed at reducing operating expenses. This record also shows additional opportunities by which B & O can, by itself, improve its operations. And, in fact, as will be hereinafter discussed, it has already initiated certain operations that were supposed to be advantages of corporate affiliation with C & O.

A weakness of the majority's report is the apparent isolation of B & O from the general condition of eastern railroads. Certainly, its balance sheets do not compare with those of the C & O or the N & W; however, these companies are the exceptions to the general debility of the railroads in the East. Viewed in a more valid perspective, the B & O is not noticeably in any more dangerous position than the Pennsylvania, the Central, or the Erie-Lackawanna. The recent changes in B & O's operations could, in fact, place it in a better position than some other eastern railroads.

I do not mean to imply that B & O does not need more working capital to modernize its plant for such is not the case. My disagreement with the majority is based on the extent and real urgency of this need. B & O's ailments are very similar to those of other eastern carriers: insufficient traffic, obsolescent facilities, intermodal competition, and duplicating operations and plants. I can find nothing to justify immediate help to the B & O by approval of these applications without giving comprehensive consideration to the effects of such action on other railroads. A delay for the purpose of consolidating this proposal with the others for decision would not, as I view the evidence, materially and adversely affect the B & O's ability to survive.

One of the two main advantages, which proponents state will result from approval of these applications, is an extensive coordination program. Inasmuch as the individual projects in this program appear reasonably likely to be implemented, it remains for the Commission to determine (1) the extent to which the program will assist the participants, particularly the B & O, by developing more adequate facilities or reducing operating expenses, or both; (2) whether these benefits will be effected as a result of the control; and (3) any disadvantages to be expected from this program.

The majority expects the coordination program to produce $13,140,843 in average annual savings over a 5-year period by the elimination of duplicate facilities. The consultants who prepared this program assumed that the savings would be divided equally between B & O and C & O. An average of $4.5 million per year of the total will be accrued for capital improvements by the B & O during this period. Because the inability of applicant to obtain 80 percent of B & O stock has thus far prevented the filing of a consolidated tax return, the estimated net cash requirements for the entire coordination project would be $20,319,917.[14] More than 90 percent of the savings are attributed to consolidation of offices, pooling of equipment, and consolidation of stations and terminals. More than $2 million could be eliminated from office expenses if proponents coordinated some administrative services. The savings from pooling of equipment are estimated at $3,725,408, of which $3,528,277 is expected to result from pooling freight cars. This arrangement, which provides B & O with C & O's surplus cars under leasing agreements, does not include heavy repair programs or car rebuilding plans. The third prominent category of the coordination program is the consolidation of stations and terminals. Average reductions in operating costs of $6,976,274 annually are expected to occur during the first 5 years.

At the end of the 5-year period, savings from the office and terminal programs will continue while the savings from car pooling will become a negligible factor as C & O reduces the number of cars leased to B & O under its car retirement plans. The entire program would thus appear to offer immediate returns for both roads with minimum outlays. However, the basic problem of car fleet would only temporarily be solved and no change would result in roadway improvements except indirectly through further application of funds created by the savings.

Savings in office expenses are expected principally from B & O's use of a new computer installation ordered by C & O. The utilization of a more modern and economical data processing computer will reduce proponents' equipment expenses and eliminate some administrative personnel. In estimating the cost reductions, the consultants made deductions for data processing improvements that are presently planned by B & O. However, they failed to take into account that such adjustments do not include the savings that B & O could make by installing a more modern computer installation at an insignificant change in cost over present expenditures. The amount of savings attributed to a shared-time usage of the C & O computer is also overstated because it is reached by assuming C & O would not be

[14] Consolidated tax returns would reduce the net cash outlay by nearly $6 million and increase average savings by $240,000.

able to sell this excess capacity to other users. Renting idle computer time is a standard practice in government and industry alike. C & O did not attempt to evaluate the possibility of finding other potential buyers. The estimate of the proponents in this category is misleading because these advantages of normal business practices are available to B & O and C & O without affiliation. Cost reductions made after consolidation can be properly termed "benefits of consolidation" only if they are made as a consequence of corporate affiliation. If this application were denied, B & O would still attempt to avail itself of more economical machinery and effect most of the savings claimed to be dependent upon control.

According to applicant, C & O's leasing of surplus cars to B & O will be the main source of economies in the pooling of equipment. The majority's conclusion is that these savings are real and will occur; the underlying facts in this record, however, do not support this conclusion. Proponents have exaggerated both the physical improvement in B & O's car fleet and the savings to be derived from this program.

The record presents a number of contradictory facts on this subject; for instance, the C & O estimates that B & O could probably use 5,800 hopper cars at peak periods and that C & O could provide 4,109 surplus cars; yet before the record was closed, C & O had leased 7,500 cars to B & O on an annually renewable basis. This is an anticipated saving which has been put into effect and for which control was not required.

As a matter of fact, applicant's evidence concerning pooling of equipment, at times, would try the imagination of even the most ardent proponent of the transaction. With respect to B & O's need for cars, the majority has rightly concluded that this program was never intended to be a permanent solution. Leasing freight cars may temporarily fulfill B & O's needs, but a permanent answer depends on large scale car rebuilding or heavy repairs. This type of program would permit B & O to maintain a sufficient, serviceable fleet of cars at a much lower cost than would result from continuous leasing arrangements.

A valid estimation of the advantages from car pooling to be expected from the lease of C & O cars, forgetting for the moment that such a plan is already operative, has to be based on B & O's freight car needs and the costs of meeting these requirements. Applicant's methods used to determine B & O requirements are suspect. The contention is made that B & O's traffic requirements show a constant need for 4,109 cars. The total is reached by taking B & O's peak usage in 1959 and showing that B & O has a large number of foreign cars on line. The chief danger inherent in owning cars or leasing

them on an annual basis to cover peak periods, which for B & O is the coal traffic movement prior to the miner's holiday, is the uneconomic cost of idle equipment which cannot be used either on line or on a per diem basis by another road during periods of normal demand. Common railroad practice has been to forego, where possible, this tenuous advantage of maintaining peak capacity fleets. If all the American railroads owned such fleets, the expense of this excess capacity would have long ago ended many of their operations. Now B & O terminates more traffic than it originates and terminating railroads have often succeeded in maintaining profitable operations without balancing cars on line with cars serviceable. The preponderant volume of terminating traffic gives a substantial surplus of foreign cars for use by a "terminating" railroad in its outgoing traffic. On the other hand, "originating" railroads such as the C & O have to maintain a higher proportion of serviceable cars to cars on line.

Applicant alleges that B & O could use C & O cars rather than other foreign cars and that this would constitute savings of over $3 million to the C & O and B & O. This is dubious reasoning that can only be based on pure conjecture. Since the lease of C & O cars was made at the standard per diem rate for 1 year, B & O could just as economically procure these cars from C & O or other roads at an equal rate, when needed, without assuming the risks of annual rental. The facts show such cars are available at regular per diem rates from other roads except during certain peak periods. Reasonable doubt exists that some of these "savings" are actual. Real savings will appear only to the extent that C & O could not receive per diem from other roads for these cars. The per diem credit, the high turnaround rate, and the unit costs of C & O fleet operations offer no evidence that C & O has a surplus which, unless leased to the B & O, will stand idle.[15] Should the condition of the national freight car supply be so abundant, then to the extent C & O cars replace other foreign cars on B & O lines, some other lines must suffer losses. B & O now leases a considerable number of cars from other railroads as is set forth in the majority's report.

The record does not show what part of C & O's surplus fleet could be utilized by other roads, including the B & O, on per diem rather than by annual lease to the B & O. Applicant suggests that 60 percent utilization by B & O is a reasonably conservative prediction. Thus, if this factor is selected, the circuitous reasoning runs full round. Given a 4,000-car surplus, C & O would then have two

[15] C &O cars operate under a special car order, C 411, that requires immediate return of its cars to a point served by C &O. This provision was granted to allow C & O to maintain control of its car fleet necessitated by its extensive originating services. But under the circumstances hereinabove discussed, exceptions to this order give the C & O power to make favorable leasing arrangements, which is not available to most other lines.

choices: (1) receiving normal per diem from other lines as their needs arise and absorbing losses for the unused time; or (2) receiving per diem rates for 365 days a year under the B & O contract and letting B & O absorb the losses for the idle time capacity. Applicant, it seems, prefers the latter course.[16]

While the savings from the consolidation of stations and terminals appear realistic, the total plant improvements and real savings from the coordination program will for the reasons hereinabove mentioned, fall far short of proponents' expectations. The benefits of the equipment pooling plan are particularly dubious and since the project has already been commenced it cannot properly be termed a benefit to result in the approval of these applications. The real savings, which can logically be considered to accrue, will not benefit B & O's operations nearly as much as it will benefit C & O's operations. While applicant could conceivably use its savings for betterments of the B & O plant, there is no assurance that C & O will do so.

Clearly, those savings which are expected to stem from the coordination projects could be obtained just as easily through cooperative agreements. A number of witnesses in this case have substantiated this fact. Equipment pooling has already begun, and coordinated terminal and station operations are already conducted by C & O, B & O, and Central resulting in more economical use of rail tunnels, yards, and trackage. There does not appear to be any barrier to prevent C & O and B & O from making additional improvements by way of a coordination program without control. As noted, joint use of data processing facilities does not depend on approval of this application, but is, in fact, an every day practice of the business world. The prospect of quick profits on the small investment necessary for these projects is a strong incentive for both C & O and B & O, and the record shows that there are several sources available from which B & O could raise the initial funds for this purpose.

For many years the Office of the Federal Coordinator of Transportation attempted to promote the formulation of cooperative agreements among railroads to reduce the economic waste of duplicate facilities in the national rail system. These efforts produced scant results, for whereas railroad officers were willing to concede the availability of great savings, they were also overly apprehensive of the competitive advantages that might befall a joint user of their facilities. In short, the railroads have been hesitant to relinquish sole

[16] An additional equipment improvement listed in applicant's program was the lease of locomotives to the B & O at projected savings of $101,826. However, equipment experts and the former president of the B & O admitted that they could foresee very little chance that the B & O could use an additional supply of motive power if traffic levels remained constant. Both the coordination and capital improvement plans are based on a continuation of the 1958–60 traffic levels. It is hard to understand how cost reductions can be effected if C & O's surplus locomotives are of no use to B & O.

control over property wherever there existed a possibility that they would not be the predominant benefactor.

There is no apparent reason to prevent C & O and B & O from achieving these coordinations independent of control. Applicant has produced substantial proof that the proposed control would primarily be of the end-to-end type wherein competition between participants is not an important factor. It therefore seems very probable that the customary forces inhibiting joint use of facilities by parallel lines of competitors do not apply. The need to increase the railroads' ability to compete with other modes, which proponents term their main objective, should serve as an added inducement if direct financial rewards alone do not suffice.

The Commission has been confronted with other consolidation applications, in which coordination savings were asserted to be a resultant advantage for the public but where corporate affiliations have also presented certain disadvantages. In denying control of the Erie by the C & O, the Commission said, in *Erie R. Co and Pere Marquette Ry. Co. Control*, 138 I.C.C. 517, 529:

> If this route possesses manifest advantages to the Chesapeake & Ohio and Erie, there should be no obstacle to the making of a joint trackage agreement by them to provide for the operation here proposed.

And in *Central of Georgia Ry. Co. Control*, 307 I.C.C. 39, 41, the Commission discussed this issue again as follows:

> However, we are of the view that many of the improvements in service which it is stated would result from acquistion of control could, and should, be effected through cooperative efforts between the two railroads under independent managements.[37]

The majority accepts the general concept of control as a form of corporate unification with very few disadvantages. Besides overlooking the apparent conclusion that the coordination projects could easily be accomplished by independent cooperation rather than corporate affiliation, the majority's report fails to give adequate emphasis to possible injurious effects which may arise from control except, perhaps, on the question of traffic diversion. Obviously, if there were no disadvantages to fear from control, it would make very little difference whether the coordination program was instituted by two independent railroads or by affiliated corporations. This is not the situation here.

The possibility of traffic diversion and the general characteristics of this type of unification are particularly relevant in evaluating the effects of the coordination program. Since the enactment of the 1920 act, which exempted control cases from the requirements of a

[37] This point did not become a controlling factor in this case because the Frisco Railroad was found to have illegally acquired control of the Central in violation of section 5(4).

"national plan," [18] control became the favorite form of corporate affiliation for the stronger railroads. The unfortunate results of some of these transactions prompted the Congress to repeal this immunity provision by enacting the Emergency Railroad Transportation Act of 1933. In advocating this proposed legislation before the Senate, former Chairman Eastman strongly urged the enactment of a law which would stimulate elimination of duplicate facilities and services through cooperation rather than by control.[19] Even with the added restriction of the 1933 act, control was still the preferred form of unification in those cases in which this applicant took a prominent part.[20]

Monopolistic abuses of affiliated carriers experienced in preceding years also became a reason for the enactment of section 5(a) of the act. The weaker, controlled railroads had been used as a source of profits from stock manipulations, and then left to sink into bankruptcy. Competitive advantages at the expense of other railroads may also result from corporate affiliation through the control of traffic. Reviewing the results of C & O control of the Pere Marquette, this Commission found that "with corporate affiliation, naturally each railroad became the other's preferred connection." *Pere Marquette Ry. Co. Merger*, 267 I.C.C. 207, 214.

An inordinate reliance has been placed by the majority throughout this report on the self-interest of the C & O in rehabilitating the B & O if control is approved. Notwithstanding the particular issues and facts presented in the instant application, which reveal the glaring lack of a single solid commitment by C & O to render specific aid to B & O and the economic impracticability of C & O's assistance in the modernization programs, the self-interest assertions of a controlling railroad do not stand the test of our experience. The controlled roads have been helped when profits could be expected by the controlling companies. The number of bankruptcy and reorganization applications filed by controlled railroads clearly shows that controlling companies are more concerned with their own welfare than with that of their "wards." Control of the Chicago and Eastern Illinois and the Erie by the C & O, for instance, did not materially assist those roads.

These lessons have not been overlooked by B & O, whose witnesses stated many times that control was acceptable only as a step towards merger. The Maryland Port Authority similarly recognizes control as detrimental to the B & O, and supports this application only because a written understanding has been made to seek merger as soon

[18] Former section 5(4) of the Interstate Commerce Act, 41 Stat. 481 (1920).

[19] Statement of former Chairman Eastman before Committee on Interstate and Foreign Commerce of the U.S. Senate, 73d Cong., 1st sess. on S. 1580 (1933) pp. 18ff.

[20] In 1937 the C & O's applications to control the Nickel Plate and Erie Railroads were approved. *New York, C. & St. L. R. Co. and Erie R. Co. Control*, 224 I.C.C. 259.

as practicable. Clearly, control does not have the wholehearted approval of B & O despite the many proposed advantages claimed by applicant. Whereas the majority finds it "cannot require the carriers to merge, either directly or indirectly by appending a condition to an approval of the control transaction," B & O must pin its only hopes of a merger on C & O's observance of what amounts to a gentleman's agreement. While B & O hopes and expects this merger plan to be completed in 6 months or a year, C & O contends that more time is needed to make thorough plans of coordinated activities and to revamp B & O's financial structure.

Perhaps the frankest statement made in the record about merger possibilities is this evaluation by C & O's president:

> In other words, if we can find we can save "X" million dollars a year by full merger over the savings available to our company under control, that self-interest will motivate our prompt final act of merger.[21]

The dangers implicit in this statement must not be ignored by the Commission in determining whether this application can be found at this time to be consistent with the public interest. The section 5 provisions of the 1940 act are not so sterile that we have to stand idly by as B & O casts its bread upon the waters of high finance.

The record in these proceedings shows that C & O and B & O could, without any decrease in savings or without any other financial or competitive losses, effect the proposed coordinations without control and the probable injuries thereof to the public.[22] The Commission should not approve a proposal which is primarily based on benefits that are obtainable at the cost of probable injurious effects to the public. Even though such benefits may exceed the injuries involved, if the facts substantially support a finding that the parties to the unification could achieve approximately equal benefits by an alternative means which does not portend probable injuries to the public interest, we should reject the proposal. To rule otherwise would be tantamount to espousing a regulatory policy that places almost total significance on private considerations, and would foster a transportation system less able to meet the requirements of the national transportation policy. I do not believe that the Congress ever meant for this Commission to approve transactions in such circumstances.

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[21] R. 173.

[22] There are, in general, certain advantages to the public interest from unifications, particularly from mergers, which cannot be gained from cooperative intraindustry actions, although this is not the case in the instant proposal. Academically, consolidations may also, on occasion, create injurious effects to the public interest: for example, diminished competition, traffic diversion, and higher operating costs caused by management control and labor difficulties attendant to large rail systems. If C & O managed to obtain 80 percent of B & O's stock, a consolidated tax filing would save over $7 million in construction expenses and operating savings of the coordination program. This advantage would not be available through cooperative agreements.

According to applicant and B & O, the second major benefit to be derived from control is the implementation of extensive capital improvement programs to B & O's car fleet and roadway.

The majority has evinced "some doubt" as to realization of the capital improvement savings although it clearly recognizes the need for the modernization of plant. No party in this case has questioned the need for improving B & O's facilities or that these plans would meet B & O's requirements: the bone of contention is where the source of capital can be found. Applicant argues that after control is approved, it will supply the necessary assistance to B & O. I feel that the majority should have given more consideration to determining whether the record shows exactly how C & O will assist B & O in the capital improvement program, or that in some other manner control will bring about these benefits. And in considering this we are to bear in mind that the burden to demonstrate the advantages of consolidation is on the applicants.

The Commission found that "real and substantial advantages of railroad grouping are capable of reasonable proof" in *Virginian Ry. Co. Control*, 117 I.C.C. 67, 85. Though the test under section 5 has changed since the *Virginian Ry.* decision, this finding is still valid.[23] Even in those instances where a record is adequate, this Commission has stated that results of a consolidation cannot, in some instances, be precisely determined and "where evidence as to the alleged benefits and injuries is conflicting, and neither the benefits nor the injuries are clearly established, the question is whether the probable benefits overbalance the probable injuries." *Chicago, B. & Q. R. Co. Control*, 271 I.C.C. 63, 146.

If the majority relies only upon C & O's self-interest to provide assistance to B & O's rehabilitation, I think that the record must indicate that such help is more than just a possibility. The findings in this repect must be warranted by the evidence, not by supposition.

To arrive at any conclusions with respect to the savings and financial requirements of B & O's rehabilitation program, it is necessary to examine the individual components of the capital improvement programs and roadway maintenance program.[24]

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[23] See also *Louisville & N. R. Co., Merger*, 295 I.C.C. 457, [illegible] wherein the Commission again commented on this point as follows:

"The Nashville interests continue to rely upon exceptions taken at the hearings in connection with the rulings of the examiner refusing to require the submission of additional information by the applicants. As in all applications filed under section 5(2) of the act, the burden of proof is on the applicants herein, and it is their responsibility to decide, at their own risk, the nature and kind of evidence to be presented in support of the application."

[24] Both B & O and C & O have presented estimates of the financial requirements for these programs and methods to accomplish the specific needs. While there are some variations between the estimates and methods in the record, the evidence shows that they are intended to bring about similar results. Since the plans introduced by C & O are more detailed and are the foundation upon which C & O has stated it is committed to assist B & O, the C & O programs will be discussed herein.

The freight car program will cost approximately $176 million spread evenly over 5 years, at which time B & O would have a fleet of 72,462 cars, an adequate total based on peak requirements, at 1958–60 traffic levels, with allowances for bad order cars.[25] It is planned to have some of the rebuilding done by establishing a subsidiary nonprofit corporation of B & O, much in the same manner as C & O now conducts its equipment operations.

More than $18 million in savings will result each year to B & O, according to applicant, due to a $12 million decrease in maintenance expenses and $6 million in per diem credit. In substantiating these claims, C & O asserts that the $12 million decrease in car maintenance expenses will be caused by reducing B & O's high per car repair costs through the application of the same methods which have produced C & O's low repair costs. Much of the controversy between the parties in this case has been caused by the allegations that savings in particular accounts will result in net income gains. Now the facts show that C & O has had low per car maintenance costs partially because some of its major repairs were accomplished by nonprofit subsidiaries thus eliminating certain equipment costs from the car repair accounts as reported for average maintenance costs per car. This type of argument, which is used consistently by applicant, gives a false picture of the net income gains from these three programs. Per diem savings included in the $18 million were also shown to be a reduction in a single account but not necessarily a profit for B & O.

Another method which was presented by C & O to derive the reduction in maintenance costs reached a similar $12 million figure by multiplying the difference between the present total of B & O's car fleet and the estimated number of required cars times average car repair costs. Interveners demonstrated that this approach overstates savings since the average repair costs were lower for many of the cars which would be eliminated inasmuch as they formed the nucleus of bad order and obsolete cars. In all probability, B & O would have ignored heavy repairs on these cars in favor of less costly improvements to the more serviceable portions of the fleet. Additional doubt as to the validity of these savings is cast by a comparison of the estimated savings of a more extensive car rebuilding program outlined by the B & O. Despite this superior modernization plan, B & O estimated only $600,000 in savings in maintenance costs over present levels.

An adjustment for interest on capital investments and for depreciation would reduce the projected $18 million savings to about $7.7 million as a net gain without including allowances for added State tax burdens, corporate taxes, or return on investment. Since the above

[25] The estimates of B & O were $35 million higher due principally to costs incurred in a different car fleet program which would rebuild more cars than would C & O's combined rebuilding and heavy repair plans.

facts indicate that the alleged savings are probably overstated, only a negligible return in financial gains may be expected.

Roadway capital improvements involve a net cash outlay of $55 million. After completion of the 5-year program, B & O will achieve expected annual savings of $11.7 million. These assertions are not challenged by the opposing parties. With similar deductions for interest and depreciation, the net gain would be $8.3 million.

The roadway maintenance program is not part of the capital improvement plans per se. Additional costs of $31.8 million over previous levels will be required to prevent a deterioration of B & O roadway neglected by deferred maintenance. Applicant alleges that $1 million may be saved through budget control and planning of maintenance of way work. Previous monetary problems have forced uneconomical practices but B & O emphatically denies any shortage of competent personnel, any need for better management policies, or the need for C & O personnel assistance. If these savings are realized, it therefore seems reasonable to assume C & O aid will not have been a determinant factor unless it gives financial assistance.

In calculating the net savings for B & O during the rehabilitation period, the majority has arrived at the figure of $16.3 million for both the capital improvement plans and the coordination program. This does not include the cost of additional roadway maintenance so that B & O would have a reduction of $15.5 million in net income or about a $38 million deficit for the capital improvement and roadway maintenance programs plus the added burden of a $171.8 million decline in working capital. The financial position will be further aggravated by the failure of the certain paper savings to produce needed capital.

While the precise figures may never be known, it appears reasonable to assume that the B & O and C & O will each save annually, at the end of 5 years, about $4 million from the coordination program, and that B & O's operating expenses, from other projects, will be reduced approximately $8 million after deductions for depreciation and interest but before taxes.[26] The failure of savings to meet proponents'

[26] The total savings estimated by applicant are definitely overstated. First, the savings from the car pooling in the coordination project can be eliminated on the grounds that they already have been made or also because they duplicate savings which are made in the equipment projects of the capital improvement program. In the latter case, car leasing would no longer be required since B & O would have a fleet adequate to handle its traffic. Additionally, the method of figuring these savings is doubtful in the first place and the estimated annual savings gives the impression that these savings will continue after the 5 years, whereas the annual withdrawal of C & O cars under their retirement program will, by the fifth year, already have reduced savings well below the annual savings of $3.5 million averaged during the 5-year coordination program. While valid deductions for other savings are impossible to estimate accurately, substantially inflated projections can also be found in office expenses of the coordination program and in the equipment projects. The $30 million annual savings before taxes also fails to include allowances for depreciation and interest of the capital expended for the coordination and roadway maintenance projects. The total savings for both roads seem far more likely to be nearer $16 million from all projects than C & O's estimation of $30 million.

Footnote continued on next page.

expectations should not minimize those improvements to the B & O plant which are considered necessary to maintain current traffic levels. Once the car fleet and roadway are rebuilt to standards of operating efficiency, B & O will be able to provide better service to its shippers.

The costs of the coordination, capital improvement, and roadway maintenance programs will be, in part, reduced by the savings which will be made during the first 5 years. C & O estimates that $53.7 million savings would probably result from these programs and that B & O's projected net working capital could supply an additional $39.9 million. While the validity of these savings, as heretofore shown, are suspect, C & O has based its claims on providing methods of attaining the $171.8 million remainder. Thus, B & O's capital requirements will be increased but as C & O's plans do not contemplate meeting these contingencies, the estimated $171.8 million is sufficient to determine if applicant will materially assist in the B & O's rehabilitation.

B & O has the necessary financial resources to carry out its share of the coordination expenses. Current short-term loans can provide nearly $10 million, B & O's share of the coordination expenses. It was estimated that $5 million could also be raised from a loan upon present collateral as another source. The total of these sources does not approach projected requirements, but, on the other hand, it would be completely unrealistic to believe modernization of this scope could be made without long-term financing.

Currently, C & O has $49.7 million in net working capital, which is considered by the majority as substantially adequate for *its own* operations. During the next 5 years, C & O will have a projected net working capital of $189.8 million before issuance of dividends. C & O has had a long policy of stable dividends, which it felt are necessary to assure a flow of new money. Since C & O has made allowances for the continuation of dividends at previous rates, working capital available to the B & O would total $23.3 million. Financial experts stated it was unlikely that even this cash would be directly provided to B & O. While C & O has almost more capital than it can use, it does not have sufficient capital to make direct loans in the amount needed to B & O.

The fate of the capital improvement program hinges on the possibility of securing additional funds for this program. Possible alternative methods for long-term financing at reasonable rates by B & O

Footnote continued.

The savings of $45 million after interest for the initial 5 years from the capital improvement plan and $22.5 million from the coordination program for each the C & O and B & O are equally subject to a significant downward revision due to similar and identical errors of omission or inflation. However, since these savings are transitional and considerably less significant than the projected economies after all programs have been completed, the particular deficiencies need not be listed.

have been explained in this record by both the proponents and opponents. The feasibility of government guaranteed loans was thoroughly discussed. Although a significant portion of the requirements might thus be met, a consensus of opinion was that the entire $171.8 million could not be obtained in this manner. It further was stated by an independent financial expert that if B & O investors learned of this possibility, they would hold out for its securement. B & O has never applied for a loan of this type, nor has it attempted to obtain a commercial loan in the recent past.

Although the 1955 refunding operation placed a blanket mortgage on many of B & O's assets, and prohibited the issuance of new bonds, this does not restrict B & O from borrowing money from other sources.

Applicant's witnesses illustrated several effective methods that could be successfully employed to raise the additional funds. The choice of these alternatives would be made at a future time when proponents could evaluate the precise costs and other market conditions of available capital. The main possibilities were as follows.

Freight cars could be acquired and financed by conventional equipment trust or conditional sales agreements. Modernization of the car fleet would produce a theoretical borrowing value far in excess of cash required for rehabilitating B & O's cars. While B & O did not think all of the fleet modernization could be made in this fashion, it should provide ample initial equity for conventional financing of at least a substantial portion of the $171.8 million.

Additional long-term loan possibilities would occur through the creation of a subsidiary company wholly owned by B & O which would purchase cars at salvage value, repair them, and then lease them back for a period of ten years at a rental rate which would amortize the total cost to the subsidiary plus interest. Applicant testified to the excellent possibilities of this method, where the lease and financial backing of the parent company made 100 percent financing available at attractive rates of interest. The capital improvement program relies, in part, on the feasibility of the economical features inherent in effecting B & O's rehabilitation by such means.

Unserviceable cars can be sold either to the C & O or carbuilding companies for immediate cash where they are not needed for salvageable parts by the subsidiary repair company. Current agreements calling for B & O to sell cars to C & O, to the extent already effected, are not dependent on control. Neither are they a charitable gesture, devoid of profits as C & O would suggest. One car company claimed it would pay B & O 20 percent more than C & O had offered and subsequent lease-back conditions would be far more beneficial to

B & O than C & O's terms, under which C & O would recoup the costs of rebuilding over 5 years, after which time the cars would still be owned by C & O and subject to full per diem rates.

Terminal and yard programs, a $22 million projected cost, could be completely financed by creating B & O subsidiary companies, which would construct the needed improvements and issue debt securities. Debt and interest payments would be repaid over the life of each facility through a lease to B & O.

Applicant, itself, has stated that the collateral pledged by B & O is substantially in excess of the outstanding secured serial notes. This borrowing value could either be used to increase present notes or possibly be withdrawn for use as collateral in other financing.

In light of the financing opportunities available to B & O, there is no real support for the majority's conclusion that "the record clearly reflects the *complete* inadequacy of B & O by itself to improve its financial position." This bleak picture of B & O's potential also fails to reflect the benefits resulting from modernization and rehabilitation, its valuable diversified traffic, the industrial expansion which reasonably appears to be destined for the areas served by B & O, and the earning characteristics of B & O stock. These were the admitted advantages, which C & O witnesses said would make control a lucrative proposition.

If the capital improvement program's dependence on the approval of this control proposal is to become more than a glowing conjecture, there should be some assurances that C & O assistance actually will be forthcoming. Independent financial experts said C & O might guarantee B & O loans, but that surmise received no confirmation from C & O witnesses. B & O appears to nourish no hope on that score.

In outlining the methods which B & O could utilize, C & O never once committed itself to participation in any of the proposed financial endeavors. Applicant estimated that B & O could obtain capital by establishing subsidiary companies, conventional equipment trusts, conditional sales agreements, obtaining loans on collateral, now substantially in excess of secured notes, and selling B & O property. C & O was content to rest its claims in terms of self-serving qualifications which binds it to nothing—one means of financing could be used by B & O or possibly C & O, another method could be carried out by B & O or perhaps jointly by B & O and C & O. Never has C & O bolstered its anxious and helpful suggestions with pledges on its own purse.

Unable to determine how the C & O would provide financial aid, the majority has relied on C & O's economic self-interest as the best possible assurance that C & O will assist B & O. The record does

not support this theory. Since C & O has stated that the necessary capital improvement funds can be raised through various methods available to B & O, are we to assume that it will be economically practical for C & O to finance projects when the returns may not equal investment possibilities from other sources? In analyzing the capital roadway projects, applicant illustrated the high returns anticipated, which met the C & O's criteria of 10 percent return after taxes. The required funds for these 26 projects, however, represented only one-fifth of the total cash outlay for all B & O projects. Return on the $176 million equipment program after taxes does not even approach C & O's investment standard even if measured by applicant's inflated prediction of savings for this project. Proponents, themselves, rule out any substantial savings from the roadway maintenance program, which is an operational necessity. Therefore, it would seem unlikely that C & O would "possibly" become entangled in these latter two programs because of economic self-interest alone since B & O could shoulder the burden through methods outlined by C & O.

The mere approval of control, by itself, will not create any new sources of revenue for B & O. By C & O's own standards, the only fit object for its investment would then be in the capital roadway projects. The entire modernization would return 21 percent annually after completion and before taxes. Of the 26 projects, 7 would return 65 percent and 5 more would produce 36 percent of the original investments. While it would seem very likely that C & O would want to finance jointly the more lucrative of these projects or to purchase part of B & O's holdings therein, their profitableness would make these projects the easiest for B & O to finance and the high returns would make B & O particularly loath to let C & O lick the icing off the cake.

C & O has also attempted to present the advantages which will result from using C & O personnel and methods to assist in B & O's rehabilitation. Interspersed in the wealth of applicant's testimony are statements purporting to demonstrate how B & O could proceed with this program at sizeable savings by using proven methods and experienced manpower provided by C & O. B & O readily admits that previous management and operating policies may have failed to provide certain economies made in similar fields by the C & O but justified its previous actions as the natural consequences of constrictive financial pressures, and different operating policies. The management of B & O disclaims any lack of knowledge, experience, or adequate manpower. Recent reorganization has replaced many top B & O officials, and the present hierarchy has said it is aware of the financial methods suggested by C & O and is capable of analyzing

and administering them without C & O's assistance. Additionally, applicant admits that these practices are not new or revolutionary concepts peculiarly within the comprehension of the C & O, but are, for the most part, tried and proven methods of the railroad industry.

The majority reasons that C & O is aware of the B & O's financial needs; that it would not have invested in B & O stock unless it intends to provide necessary funds; and that, in order to protect its own interests, it has no alternative but to assist B & O as much as possible. My analysis, however, as heretofore explained, leads to the conclusion that the evidence does not warrant these positive findings. The rehabilitation program for B & O is based realistically on financial burdens to be assumed by B & O, except where immediate profits could be reaped and in those cases assistance would be an unwelcome intrusion. And whereas C & O may have the personnel and methods to effectuate the capital improvement program, B & O does not feel it will require this aid.

As has been our experience with many past consolidation cases, the savings will be less than forecast. Furthermore, I can find no convincing evidence to demonstrate that the approval of these applications will assist in the attainment of B & O's capital improvement program to any great degree. This conclusion does not imply that C & O is following poor financial policy in attempting to obtain control of B & O. Conversely, the majority has accurately noted many advantages to C & O, which will result from the proposed system. However, these benefits will not, in themselves, provide a motive for C & O to relieve B & O of financial burdens which can be borne by B & O. At the same time I must again reiterate that I see no harm in an appropriate B & O-C & O affiliation, in and of itself; it is the harm which will befall other railroads and consequently the public which compels at this time a specific and convincing showing of the benefits to be derived from the contemplated rehabilitation program. The determination of this control proposal becomes one of weighing the certain, and to a greater extent, the "hoped for" advantages to B & O and C & O against a similar evaluation of the disadvantages to other railroads, and consequently the public interest. This is the consideration which has prompted me, in this dissent, to undertake a thorough and realistic analysis of the proposed rehabilitation program.

Traffic diversion studies with widely conflicting findings were introduced by applicant, B & O, and Central; rebutting studies were also made. Proponents argued that no substantial diversion from Central could possibly occur even under a policy of preferential solicitation while Central and the New York interests predicted traffic losses which would cause the ultimate collapse of the Central. An-

alyzing the evidence on this question, the majority, in effect, finds the C & O and B & O studies to contain no major errors of fact or judgment; the Central studies to have little probative value; and, therefore, concludes that no other rail carriers will be placed at a competitive disadvantage or otherwise substantially affected as a result of this transaction. I am in complete disagreement with these conclusions.

The characterization by the majority of the most essential single subsidiary finding in this case must be severely criticized. A conclusion "* * * that no undue amount of traffic will be diverted from Central * * *" is, in my view, a groping, meaningless generalization. To what on this record does the term "undue amount of traffic" relate? I cannot imagine that such an important and subsidiary finding posed in this form will withstand the effects of close judicial scrutiny.

If the majority regards the diversion of 10 percent or more of Central's traffic as not undue, a court would be justified in finding on this record that the majority has been cavalier in its assessment of harm to the Central. On the other hand, if the majority is thinking in terms of diversion of 1 percent of Central's traffic when it uses the phrase "no undue amount," a court would be justified in finding that the record fails to support such a conclusion. One thing is certain. Courts will not speculate upon the reasons which actuated the Commission, nor hunt for a rational basis of decision, when the Commission has failed to explain its decision with the clarity necessary to satisfy the requirements of judicial review. As the Supreme Court observed in *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 511 (1935): "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." The failure of the report to indicate whether the amount of diversion described as "not undue" is closer to 1 percent or to 20 percent of Central's total traffic is a fatal infirmity.

Nowhere in the majority's report is there any indication that consideration was given to Central's evidence that there will also be diversion from its lines if we should approve the N & W-Nickel Plate merger. Even if the instant and the N & W-Nickel Plate proposals, individually, might not substantially harm Central, the combination of the two transactions could result in serious injury to Central. Since the N & W-Nickel Plate merger case has already been heard, the majority, if it continues the case-by-case approach of this case, may well be making two decisions within a short interval, neither of which adequately determines the full scope of competitive changes. Needless to say, two separate findings of "no undue amount of traffic will be diverted from Central" may not prevent the combined competitive forces of the two systems from irreparably harming Central.

Beyond the Central's interests, the record is devoid of evidence on the extent of the diversion, which could reasonably be expected to

stem from approval of this application. While recognizing the major difficulties, which militate against the formulation of realistic traffic diversion estimates in consolidation cases, I am not satisfied that the record, in this regard, contains sufficient facts to make valid conclusions as to the repercussions on other rail competitors. At the very least, one must conclude that substantial diversion from other carriers, such as N & W, is such a distinct possibility that further evidence should be developed to adequately analyze the consequences of the proposed system.

This case has also been complicated by the withdrawal of the New York Central. The Central, which had the underlying data required to contest the C & O and B & O exhibits and oral evidence, was the only party in this proceeding with a staff of experts, the financial resources, and the information needed to dispute effectively applicant's claims. Its withdrawal before the submission of briefs left the RLEA and the State and port authorities less able to employ all the pertinent data in the necessary and time-consuming job of analyzing possible inadequacies in the proposed system.

The majority's findings with respect to traffic diversion can only be controverted by outlining the general assumptions or criteria used in the individual studies. Since the underlying data are not in the record, it would be impossible at this point for this Commission to reach any precise answer whatsoever on the quantity of divertible traffic.

The C & O made two studies of traffic diversion and a rebutting analysis of the Central study. Applicant's coal and coke shipments were examined for a 12-month period directly preceding October 1960. Of the 66,485 cars interchanged with Central, only 2,192 were considered divertible if C & O sought to gain such traffic and was 100 percent successful. A merchandise study was made of 8,280 cars interchanged with Central and only 36 were considered susceptible to maximum preferential solicitation.

B & O introduced a study of all traffic interchanged with Central during October 1960. The results listed 172 of 14,548 cars as potentially divertible. In a coal study of the 7,676 cars interchanged in May 1960 only 3 were considered divertible.

The Central study concluded that 41 percent of its total traffic could be diverted to the proposed B & O-C & O system. A random sample, representative of commodities and routes, was used to examine Central's cars. Proponents contend only 21 cars of the 5,312 listed by Central are potentially divertible.

Although the Central study probably gives a more representative sample than proponents' monthly studies by statistical standards, the divergent estimates do not, basically, appear to have resulted from

the application of different sampling techniques. Since the actual shipments examined are not in the record, further tests of the validity of statistical techniques are precluded. Application of background assumptions and practical considerations to particular shipments is also impossible for the same reason, except where specific examples were introduced for rebuttal or illustration. As the record shows that all the studies have indulged in overgeneralizations on many occasions, the selection by the majority of a specific example to indicate the weakness of Central's study is at best fragmentized support for any conclusion.

The first initial assumption neccessary to any traffic diversion study is the operating conditions of the involved railroads. C & O and B & O based their analyses on the continuance of present competitive abilities while Central's study includes the cumulative effects of diversion, a deterioration of Central's plant, and increased rehabilitation of a "C & O system."

Long-term effects are, in the final analysis, much more relevant to the development of sound transportation facilities. Changes in the quality of railroad services do not normally come overnight. The Central is not going to evaporate after a month, 2 months, or even a year after the B & O-C & O system is approved. Neither will the proposed rehabilitation create better service and bring added traffic immediately. Nevertheless, traffic losses reduce total revenues and raise operating ratios so that service deteriorates to cause additional losses. Better service creates a traffic spiral in a beneficial manner.

Proponents urge approval of this proposal because it purportedly will culminate in better service by the B & O. Terminal costs and handling are expected to be reduced, the car fleet is expected to be extensively rebuilt and modernized, and the roadway is expected to be improved. It is also expected that administrative expenses will be lowered, that tunnels will be altered to increase traffic 10 percent overnight, and that other methods would be employed to produce better service at lower costs. The shippers and railroad officials, themselves, testified that these factors have a significant bearing on traffic routing by the shippers. However, in their traffic diversion studies B & O and C & O did not consider any conditions beyond those prevailing at the present time. This Commission has recognized that "traffic is routed by the shipper and that many factors, the most important of which is service, influence such routing." *Toledo, P. & W. R. Co. Control*, 295 I.C.C. 523, 536.

It is unrealistic, I think, to conclude, as the majority does, on the one hand, that C & O and B & O, particularly, will greatly increase their capabilities to compete against other modes and, on the other, that such improvements will have no substantial effects on their abili-

ties to gain additional traffic at the expense of rail competitors. While it is true that intermodal competition has greatly reduced the railroad's proportion of total freight, there is no adequate substitute for the competition of another railroad for many shipments which have transportation characteristics best suited to rail service. I also find it difficult to understand how the majority can conclude that approval of this application will substantially increase B & O's abilities to provide more efficient and economical service and yet find that there will be no significant change in the service offered by B & O. Additionally, the majority does not discuss the consequences of reduced operating expenses and/or additional traffic revenues which might incline proponents to attempt to reduce their rates or maintain present tariffs at a time when their competitors have to increase rates. The protection against commercial closing of routes is not a complete safeguard against traffic diversion.

A concomitant deterioration of Central's service is also a real possibility. While the 41-percent diversion estimate, is, upon any analysis of the evidence, an overestimation, a 10-percent loss would create a $24 million decline in income and a 20-percent decrease would result in an annual loss of $51 million based on 1960 cost data. That the Central could not long survive even a 10-percent decline is amply supported by the record. The miles of trackage and operating revenues of the Central present impressive statistics but they do not establish the power of Central to withstand diversion. Recent deficit operations and inadequate equipment will undoubtedly become further aggravated by any diversion.

A second negative feature of proponents' initial studies is the exclusion of all cars but those interchanged with Central. Railroad practices may limit the availability of such information, but Central reasonably argued here that an increased disparity of service rendered by the two systems would cause other shipments, besides those interchanged with B & O and C & O, to be diverted to proponents' lines. The ramifications of this limitation was only too clearly shown where proponents stated that over 90 percent of those cars listed by Central as divertible were not interchanged with either B & O or C & O. In a broader vein, proponents did not give any consideration to cars which might be diverted from Central to railroads other than C & O or B & O, as a result of this proposal. At this point, I am compelled to observe that the promulgation of guidelines for diversion studies and representations through independent testimony appears to be a necessity to eliminate such inadequacies if the public interest is to be adequately protected.

Additionally, Central's study considered diversion of competitive services as compared with the parallel track diversion analysis of

proponents. Competitive effects cannot be restricted to diversion from one track to another owned by a different railroad, both of which go through the same general area to the same point with the same commodity (parallel track); but should also include changes from one route to another which serves the same function although not necessarily through the same area. For example, more effective transportation services could stimulate greater coal traffic for B & O from its territory to Lake Erie and this traffic would satisfy a demand formerly supplied from a different area by the Central, which would then find that it could still carry the same coal to Lake Erie but that there is no market. Analogously, industrial reallocation fostered by a change in transportation costs or services can, over a longer transitional period, establish or expand markets in one area and destroy or curtail demands in another area. While market dislocations are not, however, necessarily against the public interest, they may, nevertheless, change the traffic volumes of individual carriers. As a crude index of service competition, the Central showed that, including family lines, B & O serves 40 and Central serves 39 of the 43 major cities to be served by the B & O-C & O system. Statistical evidence pointed out that many of the top revenue-producing commodities and large shippers were also common to B & O, C & O, and Central.

The fourth general weakness in proponent's study is the exclusion of shipments where there are no presently published B & O-C & O routes. Central countered this exclusion by stating that routes could be easily established where they were needed. Applicant further defends its position by claiming all practical routes have been established and that new routes with points local to Central would require its concurrence. Both the shippers' and railroads' testimony produce enough evidence to illustrate that neither position is acceptable as a generalization capable of universal application. B & O admits some opportunities do exist for new routes. With corporate affiliation accomplished, opposition of B & O or C & O to a joint B & O-C & O route would be minimized. Central supported this supposition with several examples.

One of the significant characteristics of previous end-to-end consolidations, either by control or merger, has been the establishment of new traffic patterns and traffic control. While applicant and B & O have properly ruled out many shipments due to the lack of practical joint C & O-B & O routes, the wholesale elimination of over 51 percent of the C & O coal study, over 69 percent of the C & O merchandise study, and over 95 percent of the B & O October study has improperly eliminated many shipments from further consideration, a number of which undoubtedly should have been listed as divertible from Central.

The proponents then excluded most of the remaining shipments by the application of one or more of the following "practical traffic considerations": (1) a C & O-B & O shipment would produce less revenue for C & O; (2) a shipment terminated at sidings served by Central: (3) a C & O or B & O shipment is presently short-hauled by Central and C & O or B & O is therefore unable to influence the routing; (4) a shipment is allocated in accordance with the policy of national accounts and major shippers; and (5) a shipment involves transit, stop-off privileges, or the use of special equipment by Central which would preclude diversion.

Numerous facts and opinions in the record again showed the fallacy of universally applying such generalizations. The majority's acceptance of these "practical considerations" is conditioned, to a great degree, on the continuance of present service standards by proponents and their competitors. Solicitation for family lines has been experienced before, and internal short-hauling of either the B & O or C & O could be considered unobjectionable to the combined system. Although the affiliated company will continue separate solicitation offices, losses to one another in new traffic can be balanced out. Piggyback and team track service are substitutes for industrial sidings where the service standards drop below the minimum requirements. C & O has had a practice of establishing transit points for stopoff privileges, and future industry will tend to locate where rail service is adequate rather than where it is substandard.

The influence of service upon shipper routing is ignored by proponents when they state that a current short-haul indicates future inability to influence routing. Shippers may make the final decision for routing their traffic; however, this choice is predicated on a number of factors which are controlled by the carriers, including, among others, quality of service, rates, and solicitation efforts. While the practice of giving the long haul to the originating line is usually followed, the failure to provide desired service has short-hauled the Central before.

If all traffic was allocated by major shippers to the individual railroads without consideration of their solicitation policies, it would seem that the past expensive and expansive outlays of the railroads for this purpose have been a waste of money. Circuitous routes may be, and have been, used if direct joint-line service fails to meet the necessary shipper requirements. At the present time it is said Central has a greater demand for special equipment and is hard pressed to supply shippers' needs. Recently deficiencies have resulted in the Central being short-hauled or having to rent special cars. Proponents argue that B & O will modernize its fleet but that this superiority will not attract new customers or reduce inferior service. I reject this argument.

Proponents characterized the Central's study and the testimony of diversion witnesses as valueless. They emphasized that the generalized reply of Central's shippers stated that they would be injured only if service deteriorated; but the shippers, for the most part, did not say service would deteriorate. Shippers can state their requirements and the condition of past and present service; however, it is unrealistic to expect shippers to analyze the future conditions of rail service, which will be affected by the complex financial and operating data presented in a case of this nature.

Central's background assumptions revolve around the establishment of a superior B & O-C & O system in relation to its own. It would appear that Central has also indulged in overrepresenting probable injuries from diversion in a manner similar to the underemphasis practiced by C & O and B & O. If the majority can properly term the Central's study as highly speculative, I can see no reason for not hanging the same epithet on the B & O and C & O studies. Major errors of fact and judgment have been duly noted so as to refute the accuracy of proponents' statements.

Conditions for the maintenance of existing routes and channels of trade as prescribed in *Detroit, T. & I. R. Co. Control*, 275 I.C.C. 455, do not necessarily afford sufficient protection against diversion. None of the parties to this proceeding attempted to rely on these protective conditions as a force to prevent diversion, although they were well aware that their imposition as a condition upon any possible approval of this proposal was a near certainty.

These conditions for the maintenance of existing routes and channels of trade are in general conformity with those imposed in prior cases where a large railroad is acquiring control of a small one. Their primary purpose has been to prevent the controlling railroad from practices that will unduly prejudice the smaller road's relations with other railroads; but the participants in this proposal are both major carriers with large volumes of traffic. The ability of the first five conditions to restrain C & O from injurious practices to railroads other than B & O is extremely doubtful. The sixth condition is directed to actions by C & O; however, its protection extends only to closure of existing routes or channels of trade taken on account of its control of B & O.

From the evidence presented in this record, it is not clear to what extent diversion from the Central will occur. Both sides have presented studies which have very diverse conclusions based on overgeneralized and erroneous assumptions. However, the Central's demise could depend on the loss of only 10 percent of its traffic. Until the record is more adequately developed to show otherwise or until the fate of the Central in the Pennsylvania-Central merger can be

decided, I must conclude that there is a distinct probability that significant diversion from the Central could result from the approval of this application. The Central is a vital component of the eastern railroad system, and its failure to survive after the establishment of the proposed B & O-C & O system would create economic havoc in the Northeast—particularly in the already hard-hit New England area.

Evidence relating to the competitive effects which the formation of a B & O-C & O system would unleash is totally absent from the record with respect to carriers other than the Central. Applicant and B & O do not admit any appreciable competitive realignment will result from this transaction, and no railroad, other than the Central, challenges this assertion. Operating in the most highly competitive railroad territory in the Nation, proponents were willing to say that they had several strong rail competitors including the Norfolk & Western, the Pennsylvania, and the Central. Only the latter chose to oppose this application.

The failure of the large eastern railroads to present evidence against consolidation is, in my opinion, a natural consequence of their own self-interest which dictates a reciprocity of silence. For instance, opposition by the N & W to C & O control of B & O because of traffic diversion could produce damaging evidence which, in turn, could be turned about and introduced by C & O into the N & W-Nickel Plate merger. This would not only increase the burden of merger proponents in the individual cases but might also melt the merger snowball which has been gathering size as the railroad industry wins support to its view that rail consolidation is the most promising cure for the ills of this Nation's railroads. Manifestly, however, private or local policies and views which tend to encourage or oppose this concept of cure should not be permitted to obscure the basic factual pictures which relate to rail service and the public interest.

The instant cases are devoid of any active rail opposition with the exception of Central's intervention in this proceeding; and even this was quickly withdrawn upon the application for merger of the Pennsylvania and Central. Unlike previous cases, such as *Louisville & N. R. Co. Merger*, where opposition was nonexistent because of minimal intramodal repercussions, it is inconceivable that the wide-sweeping changes which are now pending for all of the largest eastern lines, will not, even individually, culminate in substantial alterations in railroad competition. I suppose that each carrier has the unalienable private right to abdicate its prerogatives to oppose any consolidation. It is the primary responsibility of the Commission, however, to preserve the development of a sound transportation system in the public interest, and where an application may offer the possibilities of public injury, the Commission must strive to obtain a record which comprehensively covers public considerations.

Our status as a quasi-judicial body does not compel this Commission to make decisions based solely on the narrow interests of the private parties as exemplified by their testimony before this Commission. As former Chairman Aitchison noted:

> They [administrative agencies] are not expected merely to call balls and strikes, or to weigh the evidence submitted by the parties and let the scales tip as they will. The agency does not do its duty when it merely decides upon a poor or nonrepresentative record. As the sole representative of the public, which is a third party in these proceedings, the agency owes the duty to investigate all the pertinent facts, and to see that they are adduced when the parties have not put them in * * *. The agency must always act upon the record made, and if that is not sufficient, it should see the record is supplemented before it acts. It must always preserve the elements of fair play, but it is not fair play for it to create an injustice, instead of remedying one, by omitting to inform itself and by acting ignorantly when intelligent action is possible * * *.[27]

The present state of transportation legislation is ample proof of the consequences of compromise on compromise between various transportation interests. The public interest is not going to evolve automatically by simply balancing interests of those actively concerned with a particular proceeding. This may be the popular or least controversial course for independent commissions to steer but the rewards of passivity and judicialitis, over the long haul, will be made at the expense of the public interest.

The true nature of the disadvantages to the public interest fails to appear because opposing parties are usually concerned with securing guarantees that their interests will not be harmed. Self-interest motivations are natural but they do not necessarily protect the totality of comprehensive public considerations. Dissenting from one of the many control decisions by the Commission between the passage of the 1920 act and 1933, former Chairman McManamy said:

> The applicant can usually be depended upon to present all of the advantages of the acquisition sought, but it seems to me that opposing parties cannot always be depended upon to present all of the disadvantages, and, as a matter of fact, I think it unreasonable to expect them to assume that burden except to the extent that their own interests require it. In matters where public interest is involved I believe that it is our duty to protect the public by developing to the fullest extent the disadvantages or losses which may result from our action.[28]

Those groups or State agencies which represent public rather than private interests, have neither the finances, the expertise, nor the material with which to introduce the public, as distinguished from private, evidence. For instance, the Michigan Public Service Commission and Ohio Public Utilities Commission, in the instant proceeding, were unable to draw any conclusions as to the extent of traffic diversion, although they realized that this was the fundamental

[27] Cited in *Isbrandtsen Co., Inc. v. United States*, 96 F. Supp. 883 at 892 (S.D.N.Y., 1951).

[28] *St. Louis S. W. Ry. Co. Control*, 180 I.C.C. 175, 212.

determinant of their positions in this case. Public representatives, in reality, become spectators rather than active participants in complex cases.

Applicant introduces numerous arguments to minimize the competition between the C & O and B & O and between the proposed system and the Central. Yet the great majority of these arguments, if applied to the N & W, would serve only to demonstrate that the improvements contemplated could not help but directly affect the N & W.

The N & W is, in the expressed opinion of applicant's management, the chief competitor of C & O. Each move of one railroad is countered by the other, and C & O's traffic agents attempt to prevent the loss of any shipments by closely scrutinizing the sales records of the N & W. This vigorous competition is primarily centered on coal traffic, which has been characterized in this record as the most intense form of competition within the railroad industry. Applicant represents that C & O and B & O coal traffic is not principally competitive because it hauled generally metallurgical coal as compared to B & O's principal carriage of steam and utility coal. However, the N & W transports primarily metallurgical coal, as the largest coal carrier in this territory. C & O and B & O rank second and third, respectively, in this category but the proportion of coal to total traffic freight, and correspondingly the degree of dependence on coal shipments, is much higher for N & W than for proponents.

N & W originates coal shipments which follow the greatest part of the main coal routes used by C & O. Coal originated by the N & W reaches many of the principal industrial areas east of the Mississippi reached by C & O. The record shows that over 91 percent of N & W's originating tonnage comes from Virginia, West Virginia, and Ohio, where C & O originates 70 percent and B & O, 64 percent, respectively, of their shipments. In West Virginia alone, the percentages of total traffic originated by the N & W, C & O, and B & O, are 56.72, 62.92, and 43.27, respectively. Furthermore, the N & W serves 64 points in common with the C & O and 16 with the B & O.

These facts support the conclusions that traffic diversion from the N & W by the proposed B & O-C & O system is a distinct probability. Given these conditions of vigorous competition, where each slight change is cause for alarm and shippers are aggressively courted with "red carpet" treatment, I think the protection of the public interest requires the development of specific evidence on the competitive effects which the proposed system would have on the N & W.

Since the N & W is itself involved in a large merger case before this Commission, it may well be that the comparative increase in

competitive strength of a B & O-C & O system with respect to N & W would be negligible in the event of approval of the proposed N & W-Nickel Plate merger. The detrimental diversion, which will probably result from approval of this proposal, with respect to the Central might similarly be voided by approval of the P R R-Central merger. However logical such consequences may appear, those cases must await consideration and be decided on their own merits.

The competitive effects of this application have not been adequately presented or developed, and, until such time as it is reasonably demonstrated that the possibility of serious injury does not exist for the other eastern railroads and that C & O will substantially assist B & O, particularly in the capital improvement programs, the possibility of public injury from this application exceeds the advantages to be derived therefrom.

The majority has denied the requests for consolidation of this proposal with the N & W-Nickel Plate and the P R R-Central merger cases. I could not disagree more heartily with my brethren. From my consideration of the facts as herein presented, I can find very little to gain *and a great deal to lose* from considering these proposals separately. My disagreement with the majority originates with the findings of fact in the instant cases and continues into policy questions posed by the extensive territorial realignment which is contemplated by the three proposed unifications.

From this limited record, I can foresee the probability of substantial injury to the public through the diminution of traffic carried by railroads outside of the proposed system. While I would not want to neglect the present situation of the B & O railroad, I do not feel that a consolidation of the cases would create such a delay as would cause serious injury to the B & O. A postponement would not reduce B & O's abilities to provide adequate transportation for national defense purposes despite the appeal of this contention. As hereinabove noted, certain of the benefits from the coordinating program with the C & O have already begun to materialize and the remaining projects could reasonably be initiated without requiring the approval of the Commission. On balance, those advantages and savings from capital improvements, which will result from control, appear to be insufficient to risk the injuries which I expect will result from traffic diversion. Generally, the B & O's present position is not so precarious as to be harmed severely by delay unless its 1961 experience, with its many distortions, becomes the single index of its financial situation to the exclusion of other indications and in disregard to the conditions faced by other eastern roads.

In the most broad and important sense, the three proposals, if approved, will establish a new railroad alignment in the East. Each

of the proposed systems would compete with each other in a large number of important traffic areas thus making it impracticable to evaluate all the competitive considerations in terms of the present alignment of railroads. Practically speaking, then, the majority has instituted here a case-by-case approach, which is not comprehensive enough to meet the complex problems involved.

A more limited question, but nonetheless one of extreme importance, is the ability of the Central, N & W, and the smaller eastern lines under their present alignments to maintain adequate service after approval of the instant proposal. Most of these lines are asking for unification into stronger systems.

I would not at this time, reject or accept the industry's contention that competition, both intramodally and intermodally, will be strengthened if all three cases are approved even though the number of independent railroads will decrease. A solid evaluation of this theory must await consideration of the records in the other cases. This decision of the majority with respect to consolidating the three cases will severely restrict our alternatives in the remaining cases and may reduce us to choosing the better of two evils—either approval of consolidations which are questionable in terms of the public interest or denying mergers only to discover that we will have already set into action forces which will threaten the survival of unmerged railroads. Inasmuch as we are now being called upon to decide the fate of the whole eastern railroad network, it seems only reasonable that we make a great effort to fully comprehend the overall results of our action with respect to the separate proposals. Although individual railroads have the right to put all their eggs in one basket and to hope that one approval will increase the necessity for another, this Commission, as guardian in this area of the public interest, must not neglect to consider the possible disastrous results to the public of this action.

The decision to isolate this case from the others is going to haunt this Commission for many days to come if the Central and, to a lesser extent the N & W, are not allowed to strengthen their lines in the remaining "merger" cases. If even 10 percent of the Central's traffic is diverted by the approval of this application and it is not allowed to "merge," the Central will collapse. The catastrophic disaster which would befall New England, New York, and the smaller railroads dependent on the Central for traffic could then only be alleviated by Government ownership of, or subsidies to, the Central. A possibility of either of these courses would obviously militate against disapproval of the PRR-Central merger, which I am sure the majority, as much as I, does not want to prejudge at this time. Unfortunately, under the case-by-case method we have no way of knowing at

this moment if this transaction will create undesirable results to the eastern transportation system. Trapped into approving all three cases one by one, this Commission may be placed in the hapless position of "robbing Peter to pay Paul" not once but thrice.

By consolidating these cases, this application could be found consistent with the public interest if certain issues in this case took on different values through a changed perspective. For instance, the danger of traffic diversion from other roads could become lessened or eliminated if they were being strengthened in parallel unifications. There is also the additional savings to the C & O and B & O which might result if the Central released its B & O stock so that a consolidated tax return filing could be filed. Furthermore, a B & O-C & O system might even become a desirable instrument of public policy to provide stronger competition with the other two proposed systems should they be approved.

I would not deny that additional evidence introduced by the reopening of this record might clarify, to some extent, these competitive considerations. However, I do not feel that the present state of eastern railroad aspirations is conducive to eliciting negative testimony from railroads, particularly when it must come from railroads which are now seeking merger in other cases. The Commission could at great expense in effort and time, attempt to develop such evidence through a separate reopening of this case; but we still, in all probability, would be forced to make a decision which is open to the same dangers and pitfalls of abstract evaluation. The public interest can, in my opinion, most efficiently and effectively be dispatched by consolidating these cases for decision. Using this approach, the Commission would then be better able to evaluate all of the problems involved and could develop any additional facts as may be required. I do not think, however, that the development of a "three case" single consolidated record, a suggestion of the Department of Justice, is appropriate. There would be numerous problems in this approach and it does not seem to have any real advantages over the less time-consuming reopening of the individual records if and where necessary.

If the Commission is going to open the gates on all eastern merger applications so each successive one becomes one of the basic reasons for requiring approval of the next, and realistically, I can see no other course of action from the decision in this case, we may end up as the creators of another Frankenstein's monster far more ruinous than its fictional counterpart. Although the provisions of the 1940 act do not charge this Commission with approving only those transactions which *promote* the public interest, we do have a fundamental responsibility to consider all the foreseeable effects to the public

which may flow from the cases before us. This is not returning to the days of the 1920 act and a national plan as applicant charges; it is simply employing all our statutory powers to determine if these applications will assist in effectuating the national transportation policy. Notwithstanding applicant's threat to withdraw its application, if this Commission chooses to follow this course of action, I will not embark on a predetermined course charted by the railroads without examining all the facts necessary to ascertain the full consequences of my action.

COMMISSIONER BUSH, dissenting:

To a degree, I share with Brother Tucker and Brother Webb some concern over the proposed method of aligning these two railroads, and their feeling of a lack of definite and foreseeable results in the immediate future.

I do not feel apprehension against any appropriate alignment of these railroads but I would prefer to see it applied for as a good, solid, constructive merger proposal. While I realize that there are certain stockholder advantages and program possibilities offered by control, I think that the public interest would be better served by our analysis of those specific features of railroad service which an actual merger would foresee.

I also agree with my Brethren (Tucker and Webb) that there is not enough urgent and immediate need at this time to grant this application, and I think the public interest would better be served by consolidating this case for decision with the PRR-NYC and N & W-Nickel Plate cases. This is the only way to avoid the danger, somewhat implied—somewhat real, of affecting the forthcoming decisions in these other two major cases.

APPENDIX I

Excerpts from report and order of hearing examiner

Applicant's general description.—Applicant is a Virginia corporation, authorized to do business in that State and also in the States of West Virginia, Kentucky, Ohio, Indiana, Illinois, Michigan, and New York, the District of Columbia, and the Province of Ontario, Canada. It operates about 5,091 miles of railroad extending eastward from Chicago in two prongs, one in a southeasterly direction via Cincinnati, Ohio, to Newport News, Va., and Washington, and the other in a northeasterly direction via Detroit, Mich., to Buffalo, N.Y. It also operates a line from Limeville, Ky., on its southern prong via Columbus and Toledo, Ohio, to Plymouth, Mich., on its northern prong, together with numerous branch lines located principally in the States of Virginia, West Virginia, Michigan, and Kentucky. It also provides service to the westbank Lake Michigan ports, of Milwaukee, Manitowoc, and Kewaunee, Wis., by means of a car-ferry operation from Ludington, Mich. Other important industrial areas reached by its lines include Richmond, Lynchburg, and Covington, Va.,

Charleston and Huntington, W. Va., Ashland and Louisville, Ky., Lancaster and Marion, Ohio, Richmond, Muncie, Gary, and Hammond, Ind., Grand Rapids, Muskegon, Flint, Saginaw, Midland, and Port Huron, Mich., and Sarnia, Windsor, and St. Thomas, Ontario. Coal comprises its principal traffic.

* * * * * * *

General description of B & O.—Baltimore & Ohio was incorporated in 1827, under the laws of Maryland. It operates about 5,910 miles of road located in the States of New York, Delaware, Pennsylvania, Maryland, Virginia, West Virginia, Ohio, Indiana, Illinois, Kentucky, Missouri, and Michigan, and the District of Columbia. Its lines extend from Philadelphia, Pa., on the east, to Chicago, Beardstown, Ill., and St. Louis, Mo., on the west, and from Rochester, N.Y., Buffalo, Cleveland, Ohio, Sandusky, Ohio, and Detroit on the north to Charleston, Kenova, W. Va., Portsmouth, Ohio, Louisville, and Shawneetown, Ill., on the south. It also operates lines in the port of New York area which are not connected with other system lines. Other important industrial areas served include Wilmington, Del., Baltimore, Md., Johnstown and Pittsburgh, Pa., Wheeling, W. Va., Parkersburg, W. Va., Charleston, Huntington, Zanesville, Ohio, Youngstown, Ohio, Akron, Ohio, Columbus, Dayton, Ohio, Cincinnati, Indianapolis, Ind., and Springfield and East St. Louis, Ill. Like C & O, coal comprises its principal traffic.

* * * * * * *

B & O's deferred maintenance and need for capital improvements.—A number of witnesses presented considerable evidence on these subjects, the gist of which is that both financially and physically, B & O is in very bad shape, and what is more important, its position is worsening at an alarming rate. The constantly recurring theme of their evidence is that B & O, for lack of funds, has not been able to maintain its plant to desired standards or undertake desirable or imperatively needed improvements which would increase its earning power. Its vice president in charge of operation and maintenance testifying with respect to specific items described the present poor condition of B & O's road property as follows:

"(a) Its subgrade by modern standards is too narrow in many places but widening work has been curtailed and in some instances suspended due to a lack of funds. The bore in many of its tunnels is insufficient to permit the handling of extra wide or high equipment and as a result it has had to forego handling of traffic requiring such equipment including semitrailers on flat cars and automobiles on 3-deck automobile cars. Since 1957, it has purchased $700,000 worth of heavy machinery for use in widening the subgrade which is now idle because funds required for its operation are not available.

"(b) In many locations, B & O suffers from pumpy and muddy ballast conditions which tend to shorten the service life of ties and rail. The quantity of ballast installed has declined from an annual average of 1,224,405 tons during the period from 1940 through 1948, to 940,000 tons from 1949 through 1953, and to 475,000 tons from 1954 to 1960.

"(c) There are some 28 million cross ties in B & O's tracks and based on an average 30-year service life, annual installation of about 940,000 ties would be required. B & O's tie replacements for a number of years have been at a renewal rate reflecting a service life of about 29 years, but the installation during the period from 1940 to 1952 of about 15 million ties with insufficient seasoning has greatly shortened their service life.

"(d) The average age of rail in main tracks is about 25 years and there are about 3,700 main-track miles laid with 100-pound or lighter rails. Over the past 10 years new-rail renewals have averaged 35,733 tons but the average for the 3

years 1958–1960 was only 12,840 tons and in 1960 only 6,700 tons (28.28 track miles) were laid. B & O has 7,180 miles of main track and 3,545 miles of side and yard tracks, and its officials believe that new and heavier rail should be laid on about 3,000 miles of main track and the replaced rail utilized to support the remainder of the main line and yard tracks and sidings.

"(e) The bridges on the line are structurally sound but many of them are in need of minor repairs in order to prolong their life. Buildings are in need of general repairs and painting.

"(f) B & O still uses 59 mechanical interlockers placed in service between 1900 and 1930, and it has 653 semaphore signals installed from 1911 through 1923. All of these signals are in need of repair or replacement by centralized traffic control projects. However, CTC on the B & O started in 1958, has progressed sporadically due to a lack of available funds.

"(g) The condition of B & O's freight cars is equally appalling. On December 31, 1960, it owned 86,180 cars of which 22,037 or 26 percent were in bad order. The service lives of 41,478 of these cars had expired from age and 9,684 cars were obsolete. The condition of B & O's open-top hopper cars was worse than average. Of 41,419 such cars owned on the above-mentioned date, 14,386 or 35 percent were in bad order, 24,172 were overage, and 5,792 were obsolete. Many of these cars are equipped with Duryea underframes, a type requiring a great amount of repairs. The excessive bad order situation has resulted in excess annual maintenance expenses of about $8,000,000 in the last 3 years and a greater use of foreign-line cars, resulting in increased per diem payments. The rationing of car repair expenditures made necessary by a lack of adequate funds has limited the number of cars that could be repaired and the attempt to keep 50,000 cars in repair that should have been retired has resulted in cars being serviceable for only a limited number of loadings and in many cases only one loading. In the 12 months' period ended August 31, 1960, unrepaired bad-order cars averaged about 1,000 per month and out of every 100 cars going on bad order only 80 were being repaired.

"(h) B & O has 28 diesel locomotives which cannot be used in the system freight-locomotive pool because they are low in horsepower, and obsolete in operating features. In addition, they have reached a point where major repairs estimated as costing $800,000 will be necessary if they are to continue in service. B & O estimates that these locomotives could be replaced with 21 remanufactured locomotives of greater horsepower at a net cost of $2,119,280, resulting in an annual net savings in maintenance costs of $207,200."

The present poor condition of B & O's property, as described by its witnesses, is said to be attributable to its stringent financial circumstances and the resulting inability to carry through its planned projects. The scheduling of maintenance expenditures in reference to revenues instead of to needs, and the rationing of allotments on a month-to-month basis, with no assurance that even monthly allotments would be met, has been the principal reason for B & O's deferred maintenance. One very harmful result of these conditions has been a large increase in derailment expenses on the system. The evidence is convincing that there is a large amount of deferred maintenance and a need for substantial amounts of capital expenditures on the B & O system. Its witnesses estimate that its total cash requirements during the 5 years' period subsequent to 1961, for maintenance above the level of the 1958–60 period, for roadway improvement projects and for the replacement of wornout equipment will aggregate $312,000,000. * * *

Applicant's plan for B & O under control.—Applicant, upon obtaining control of B & O, plans to assist it with a program of modernization and rehabilitation,

principally by providing it with much-needed financial support. Witnesses representing each carrier and Wyer, Dick & Co., a firm of consulting engineers, hereinafter referred to as Wyer, employed by applicant to make a study of the probable economies which would result from its control of B & O, testified on this subject. Both applicant and B & O indorse the program proposed by Wyer. While the program of improvements proposed by applicant differs in some respects with that described by B & O's witnesses, the two companies are in general agreement with respect to B & O's overall requirements.

Only properties of C & O, B & O, and those of the latter's subsidiary Baltimore and Ohio Chicago Terminal Railroad Company were studied in the Wyer report and no economies which could be realized apart from control were included. Annual savings and net cash requirements to achieve such savings, including the added cost of labor protection, were estimated on two bases reflecting different treatments of nonrecurring income tax savings depending on whether or not a consolidated tax return was in order. The results of this study are summarized in the following table:

Summary of estimated average annual savings for first 5 years and net cash requirements

Study No.		Reflecting different treatment of nonrecurring income tax savings related to B & O	
		Separate returns	Consolidated return
	Annual savings for first 5 years		
1	Consolidation of stations and terminals	$6,976,724	$7,099,442
2	Elimination of duplicate lines	57,346	84,191
3	Duplicate passenger train service	566,875	566,875
4	Consolidation of offices	2,033,560	2,033,560
5	Pooling of equipment:		
	F—Freight train cars	3,528,277	3,528,277
	L—Locomotives	191,826	213,466
	W—Work equipment	5,265	4,992
6	Cost of labor protection	199,970-I	119,829-I
	Total	13,140,843	13,390,973
	Estimated net cash requirements		
1	Consolidation of stations and terminals	14,678,741	12,288,903
2	Elimination of duplicate lines	260,550-G	591,269-G
3	Duplicate passenger train service	8,000	8,000
4	Consolidation of offices		
5	Pooling of equipment:		
	F—Freight train cars		
	L—Locomotives	201,910-G	685,040-G
	W—Work equipment	18,187-G	10,560-G
6	Cost of labor protection	6,113,868	3,648,154
	Total	20,319,917	14,658,067

No symbol—required.
I—Increase.
G—Realized.

The consolidation of stations and terminals would occur at nine points where the two roads meet or cross each other; namely, at Chicago, and Cincinnati, Toledo, Fostoria, Columbus, Athens, Wellston, and Jackson, Ohio, and Huntington. The coordinations at Chicago, Cincinnati, and Toledo would be extensive involving the joint use of yards and other facilities.

The elimination of duplicate lines involved in the study comprise the abandonment by applicant of 16.9 miles of line between Dundas and Jackson, Ohio, and by B & O of 8.6 miles of line between Huntington and Kenova, W. Va. The

latter was considered unfeasible under limited control. In each instance industries located on lines to be abandoned would be served under trackage rights over adjacent lines of the other carrier.

The savings shown for duplicate passenger train service would be obtained (1) by combining C & O trains Nos. 46 and 47 between Columbus and Detroit via Fostoria, Toledo and Plymouth, Mich., with B & O trains Nos. 19 and 20 between Washington and Detroit, at Fostoria, and operating the combined trains over B & O's tracks between Fostoria and Toledo and C & O's tracks between Toledo and Detroit via Plymouth, and (2) by operating B & O trains Nos. 53, 54, 57, and 58 between Cincinnati and Detroit over C & O's tracks north of Toledo in lieu of Central's tracks; and (3) by B & O utilizing the Fort Street Station at Detroit in lieu of the Michigan Central Depot.

The savings resulting from consolidation of offices would be obtained principally by using a Univac III computer which C & O has on order to be installed at Huntington to perform the day-to-day routine mechanized work of both companies, in lieu of C & O's Univac I computer located at Cleveland and B & O's Datamatic computer located at Baltimore. About two-thirds of the estimated savings would flow from a reduction in forces required for the combined operation.

The savings resulting from the pooling of equipment would flow from a utilization by B & O of C & O's surplus freight-train cars and locomotives and a combination of duplicate work equipment and less-than-carload car lines between major points. Using a complicated formula, Wyer determined that applicant had 3,361 surplus boxcars, 2,444 surplus gondola cars, and 4,109 surplus hopper cars which could be used to take care of B & O's shortage of 422 serviceable boxcars and 5,808 hoppers. Also, applicant had 31 surplus locomotives which could be used by B & O upon retiring 34 locomotives of less horsepower and more expensive maintenance costs.

In addition to the coordinations proposed by Wyer, applicant proposes to help B & O with a 5 years' program of building and repairing freight cars, improving freight yards at various places, improving tunnel clearances, modernization or construction of coal and ore handling facilities at specified points, installation of traffic control systems at various locations, and improvements to track and bridge structures, roadway machinery, and system servicing facilities. The entire program is estimated to cost more than $232 million and result in a net saving after interest of more than $45 million.

* * * * * * *

Traffic diversion studies.—At the time of the hearing herein, Central opposed applicant's proposed affiliation with B & O unless it were included on an equal basis with applicant.

* * * * * * *

As previously stated, during the course of the hearing, all carrier parties to these proceedings except Central withdrew their opposition to applicant's proposal and only the latter presented a traffic study to show a possible diversion of its traffic to a coordinated C & O-B & O system if it should be approved. On the other hand, both applicant and B & O presented studies to show that such diversion would not occur and could not be effected under the proposal. These studies will be discussed separately.

Central, finding that it was impractical to analyze 3.2 million carload shipments handled by it in 1960, resorted to a sampling technique whereby the data on one of 250 movements selected by the use of a table of random decimal digits issued by the Commission's Bureau of Transport Economics and Statistics, were

studied to determine whether or not it could be diverted to a coordinated C & O-B & O system, * * * assuming that such system would have overwhelming financial strength with significant improvement after consummation of the coordination in (*a*) service, (*b*) car supply, (*c*) facilities, (*d*) special equipment, (*e*) cost savings translated into rate advantages, and (*f*) improved and additional competitive routes; and a resulting deterioration in Central's (*a*) service, (*b*) car supply, (*c*) facilities, (*d*) special equipment, (*e*) costs (rate disadvantage), and (*f*) unfavorable position for obtaining routes and divisions. The shipments studied were to be considered divertible if there were C & O-B & O routes available for their movement or if one could be established which would offer a serious competitive threat under the above-described assumptions. Of the 13,050 shipments studied, Central concluded that 5,312 shipments or 41 percent of those studied could be diverted to the proposed system. Since the study was said to be representative of all of its traffic, it estimated that if applicant should be authorized to acquire control of B & O without the inclusion of Central, the latter could lose 41 percent of its total traffic.

* * * * * * *

The studies made by applicant and B & O are somewhat similar in that they involved an examination only of carload shipments interchanged by their respective lines with Central during specified periods. Applicant's study of coal and coke traffic involved movements for the 12 months' period from October 1959 through September 1960, consisting of 66,485 carloads which moved through 28 gateways but principally through Cincinnati, Columbus, and Toledo. Only 2,192 of the total shipments were considered to be divertible to C & O-B & O routes if solicitation were 100 percent effective. There were no published C & O-B & O routes for 33,941 movements and for 32,544 movements where routes were available 30,352 shipments were considered nondivertible from Central because (1) a C & O-B & O movement would produce less revenue for C & O; (2) movements terminated at sidings served only by Central; (3) C & O is presently short-hauled by Central and is therefore unable to influence the routing; and (4) the traffic is allocated in accordance with policy of national accounts and major shippers. Applicant's merchandise traffic study analyzed all cars interchanged directly between it and Central, and all cars in which both participated in the line-haul movement during the month of October 1960. In summary, the study covers 8,280 carload shipments of which 2,957 were forwarded and 2,667 were received by applicant in interline service and the remaining 2,656 shipments were handled in overhead service. It shows that there were no direct, joint C & O-B & O divisional routes available on 6,660 shipments, and that of the 1,620 shipments where such routes were available, only 36 shipments were considered divertible from Central if solicitation efforts were 100 percent successful. The remaining 1,584 shipments in this category were considered nondivertible for the following reasons: (1) loss of revenue if cars moved over C & O-B & O routes; (2) traffic policies of national accounts and major shippers; (3) shipments originate or terminate at sidings served only by Central; (4) applicant presently unable to secure traffic for its long-haul routes; and (5) transit, stopoff privileges, and special equipment services by Central preclude diversion.

The study made by B & O involved shipments interchanged during October 1960, and coal and coke shipments interchanged in May 1960, all of which are considered to be representative of its total traffic. A total of 7,648 merchandise shipments and 14,132 coal and coke shipments were examined and out of these totals only 157 merchandise shipments and 18 coal and coke shipments were considered divertible if solicitation were 100 percent effective. The remainder of the traffic was considered to be nondivertible for the following reasons: (1)

movements of 3,257 shipments of merchandise and 13,715 shipments of coal and coke were outside of C & O's territory; (2) there were no competitive routes or rates available for the movement of 1,549 shipments of merchandise and 820 shipments of coal and coke; (3) B & O would be short-hauled on 941 shipments of merchandise; (4) the routes of 749 shipments of merchandise were determined by transit rates; (5) B & O would receive less revenue on 395 merchandise shipments; (6) 521 merchandise shipments and 23 coal and coke shipments constituted traffic allocated by national accounts; and (7) special service or equipment factors dominated the movement of 79 merchandise shipments.

Applicant and B & O also applied the divertibility factors outlined in their studies to the 5,312 shipments in Central's study which it considered to be divertible to C & O-B & O routes. A relatively small number of these shipments could not be identified and therefore were not further considered. Of the shipments studied, 398 moved in joint-line service with either C & O or B & O and the remainder were either local to Central or were interlined with other carriers. From their examination of the data furnished by Central, they concluded as a practical matter that C & O-B & O hauls could be substituted in lieu of Central's service on only 21 shipments and they considered the remainder as nondivertible because B & O or C & O did not participate in applicable routes or rates for their movement or practical traffic considerations precluded their participation in the movements and numerous specific examples of both categories were cited.

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APPENDIX II

The Chesapeake and Ohio Railway Company comparative general balance sheets as of December 31, for years 1960 and 1961

	Year 1960	Year 1961
Assets		
Current assets:		
Cash	$16,287,119	$20,118,882
Temporary cash investments	49,830,959	42,432,203
Special deposits	1,684,082	1,644,121
Loans and notes receivable	4,832,150	2,390,660
Traffic and car-service balances—debit	414,501	
Net balance receivable from agents and conductors	5,685,611	7,998,998
Miscellaneous accounts receivable	3,241,429	3,440,922
Interest and dividends receivable	906,474	682,978
Accrued accounts receivable	14,805,698	20,960,769
Working fund advances	135,394	132,411
Prepayments	625,526	665,119
Material and supplies	14,843,362	13,940,826
Other current assets	9,181,813	8,847,100
Total current assets	122,384,119	[1]23,224,949
Special funds:		
Sinking funds	4,116	2,032
Capital and other reserve funds	8,466,054	2,472,123
Insurance and other funds	168,499	163,487
Total special funds	8,638,669	2,637,642
Investments:		
Investments in affiliated companies	57,356,557	59,893,619
Other investments	4,709,312	[1]35,969,427
Reserve for adjustment of investment in securities		[2](735,428)
Total investments	62,565,869	95,127,618
Total properties, less depreciation and amortization	868,500,751	847,445,580
Other assets and deferred charges:		
Other assets	1,684,781	1,512,398
Unamortized discount on long-term debt	845,959	718,900
Other deferred charges	1,302,763	3,816,303
Total other assets and deferred charges	3,833,503	6,047,601
Total assets	1,065,922,911	1,074,483,390

See footnotes at end of table.

	Year 1960	Year 1961
Liabilities and shareholders' equity		
Current liabilities:		
Traffic and car service balances—credit		$589,862
Audited accounts and wages payable	$6,068,621	6,274,410
Miscellaneous accounts payable	3,098,795	3,275,337
Interest matured unpaid	1,047,383	1,013,983
Dividends matured unpaid	27,780	43,700
Unmatured interest accrued	2,686,807	2,669,371
Unmatured dividends declared	23,037	21,978
Accrued accounts payable	10,918,211	[2] 24,116,208
Federal income taxes accrued	9,960,848	8,903,361
Other taxes accrued	19,108,356	18,359,978
Other current liabilities	6,520,932	8,315,353
Total current liabilities	59,420,770	73,552,641
Long-term debt due within 1 year	18,157,781	18,379,781
Long-term debt due after 1 year:		
Funded debt unmatured	201,757,000	222,700,483
Equipment obligations	131,030,503	114,164,722
Total long-term debt due after 1 year	332,787,503	336,865,205
Reserves:		
Pension and welfare reserves	1,575,791	1,508,199
Casualty and other reserves	10,900,873	[2] 1,759,365
Total reserves	12,476,664	3,267,564
Other liabilities and deferred credits:		
Other liabilities	3,502,148	5,238,918
Other deferred credits	10,281,684	11,420,648
Accrued depreciation—leased property	1,007,031	1,226,773
Total other liabilities and deferred credits	14,790,863	17,886,339
Shareholders' equity:		
Capital stock—common	205,062,903	205,531,028
Capital stock—preferred	2,621,400	2,500,400
Stock liability for conversion	21,225	21,225
Total capital stock	207,705,528	208,052,653
Capital surplus—premiums and assessments	7,890,872	8,376,698
Capital surplus—paid-in surplus	5,820,025	5,867,829
Other capital surplus	704,575	937,215
Total capital surplus	14,385,472	15,181,742
Retained income—unappropriated	406,198,330	401,297,465
Total shareholders' equity	628,289,330	624,531,860
Total liability and shareholders' equity	1,065,922,911	1,074,483,390

[1] Increase over 1960 due principally to acquisition of capital stock of Western Maryland Railway Company and of the Baltimore and Ohio Railroad Company, as follows:

	1960	1961
W. Md. Ry. Co.	$4,485,062—142,000 sh. comm.	$10,789,942—325,000 sh. comm.
B. & O. R. Co.		$23,744,983—575,475 sh. comm.
Do.		$480,987—9,000 sh. pfd.

[2] Principally reserve for unsecured notes of A. H. Bull Steamship Co., $500,403. (Amounts in parentheses denote credit items.)

[3] In accordance with accounting series circular No. 122 issued by the Bureau of Accounts on Feb. 17, 1961, employees' vacations earned in 1960 payable in 1961, and earned in 1961 payable in 1962, in the aggregate amount of $8,700,426 was transferred from A/C 774, Casualty and Other Reserves, to A/C 759, Accrued Accounts Payable.

APPENDIX III

The Chesapeake and Ohio Railway Company comparative income statements for the years 1957 to 1961, inclusive

(000 omitted)

Accounts	1957	1958	1959	1960	1961
Railway operating revenues:					
Freight	$401,308	$328,470	$322,724	$318,807	$292,805
Passenger	7,113	6,298	6,044	6,100	5,761
Mail	3,696	6,013	4,506	4,571	4,821
Express	860	745	1,017	901	713
Other transportation revenues	5,176	4,319	4,683	4,735	4,305
Miscellaneous revenues	14,177	9,900	8,620	8,409	7,588
Total railway operating revenues	432,330	355,742	347,594	343,523	315,993
Railway operating expenses:					
Maintenance of way and structures	52,755	37,995	40,345	42,033	38,616
Maintenance of equipment	72,812	59,207	60,957	63,634	61,872
Traffic	10,178	9,380	9,983	10,228	10,092
Transportation	144,561	128,241	127,375	128,788	125,694
Miscellaneous operations	1,483	1,232	1,241	1,241	1,215
General	18,115	18,959	19,165	18,966	19,140
Total railway operating expenses	299,904	255,014	259,066	264,890	256,629
Net revenue from railway operations	132,426	100,728	88,528	78,633	59,364
Railway tax accruals:					
Federal taxes:					
Income	30,350	14,950	9,700	4,950	(327) cr.
Railroad retirement	9,224	7,421	8,016	8,479	8,017
Railroad unemployment insurance	2,971	2,953	4,299	4,743	4,473
Other	136	73	88	94	1
Total Federal taxes	42,681	25,397	22,013	18,266	12,164
State, local, and other taxes:					
Property	14,281	13,346	14,015	13,623	12,287
Other	1,370	1,165	1,905	1,626	923
Total State and other taxes	15,651	14,511	15,920	15,249	13,210
Total railway tax accruals	58,332	39,908	37,933	33,515	25,374
Railway operating income	74,094	60,820	50,595	45,118	33,990
Net rents	4,061	2,620	4,345	3,287	3,803
Net railway operating income	78,155	63,440	54,940	48,405	37,793
Other income:					
Dividend income	1,855	1,527	901	3,398	2,316
Interest income	1,366	1,053	1,988	2,973	1,978
Other income	1,004	2,454	2,902	2,300	3,079
Total other income	4,425	5,034	5,791	8,671	7,373
Total income	82,580	68,474	60,731	57,076	48,166
Miscellaneous deducted from income	1,093	1,256	510	739	704
Income available for fixed charges	81,487	67,218	60,221	56,337	44,462
Fixed charges:					
Rent for leased road and equipment	92	222	611	606	620
Fixed interest on funded debt	13,655	14,286	13,644	13,271	13,709
Interest on unfunded debt	1	849	129	89	380
Amortization of discount on funded debt	173	157	150	134	123
Total fixed charges	13,921	15,514	14,534	14,108	14,832
Income after fixed charges	67,566	51,704	45,687	42,229	29,630
Other deductions					
Net income	67,566	51,704	45,687	42,229	29,630
Operating ratio (per cent)	69.37	71.69	74.53	77.11	81.21
Depreciation charged to operating expenses	$26,417	$28,131	$28,210	$28,620	$29,204

APPENDIX IV

Baltimore and Ohio Railroad comparative general balance sheets as of Dec. 31, for years 1960 and 1961

	Year 1961	Year 1960
Assets		
Current assets:		
Cash	$11,046,056	$18,670,953
Temporary cash investments	1,171,633	4,623,215
Special deposits	1,218	1,713
Traffic and car service balances (dr.)		4,184,303
Net balance receivable from agents and conductors	8,623,228	6,624,357
Miscellaneous accounts receivable	5,731,308	5,061,534
Interest and dividends receivable	38,837	63,271
Accrued accounts receivable	16,092,293	23,145,717
Working fund advances	131,036	131,461
Prepayments	483,915	485,041
Material and supplies	24,958,893	26,948,566
Other current assets	1,152,074	273,057
Total current assets	69,430,578	90,213,188
Special funds:		
Sinking funds	1,164	8,571
Capital and other reserve funds	132,174	202,290
Insurance and other funds	3,384,340	3,376,008
Total special funds	3,517,678	3,586,869
Investments:		
Investments in affiliated companies	255,691,933	269,837,263
Reserve for adjustment of investment in securities	[1] (26,000,000)	
Other investments	77,999,527	78,496,854
Total investments	307,691,460	348,334,117
Total properties, less depreciation and amortization	763,616,021	786,124,295
Other assets and deferred charges:		
Other assets	2,693,091	11,614,498
Unamortized discount on long-term debt	3,983,492	4,227,692
Other deferred charges	2,161,663	8,320,662
Total other assets and deferred charges	8,838,246	24,162,852
Total assets	1,153,093,983	1,252,421,321
Liabilities and shareholders' equity		
Current liabilities:		
Loans and notes payable	15,350,000	11,337,500
Traffic and car service balances—credit	2,462,808	
Audited accounts and wages payable	13,672,784	27,653,376
Miscellaneous accounts payable	7,395,840	3,539,668
Interest matured unpaid	1,232,777	2,261,559
Dividends matured unpaid	46,755	1,593,526
Unmatured interest accrued	5,045,393	4,191,698
Unmatured dividends declared		3,928,167
Accrued accounts payable	36,960,840	17,687,649
Federal income taxes accrued	201,300	201,300
Other taxes accrued	11,192,455	4,434,686
Other current liabilities	230,456	20,048
Total current liabilities	93,791,408	76,749,177
Long-term debt due within 1 year	12,873,203	12,257,218
Long-term debt due after 1 year:		
Funded debt unmatured	345,205,893	347,102,526
Equipment obligations	55,246,312	64,541,758
Payable to affiliated companies	4,274,844	15,880,977
Total long-term debt due after 1 year	404,727,049	427,525,261
Reserves:		
Insurance reserves	4,338,325	4,451,854
Casualty and other reserves	3,399,979	1,264,393
Total reserves	7,738,304	5,716,247

[1] Provision for impairment in value of Reading Company capital stock. This reserve was established during 1961 to reflect permanent decline in market value of that investment.

	Year 1961	Year 1960
Liabilities and shareholders' equity—Continued		
Other liabilities and deferred credits:		
Other liabilities	$997,509	$1,194,937
Other deferred credits	3,953,459	13,973,938
Accrued depreciation—leased property	2,056,822	1,911,048
Total other liabilities and deferred credits	7,007,790	17,079,923
Shareholders' equity:		
Capital stock—common (2,546,951 shares)	254,695,148	254,695,148
Capital stock—preferred (599,998 shares)	59,999,807	59,999,807
Total capital stock	314,694,955	314,694,955
Capital surplus—premiums and assessments on stock	3,355,721	3,355,721
Capital surplus—paid in	477,460	477,460
Capital surplus—other	338,910	302,475
Total capital surplus	4,172,091	4,135,656
Retained income—appropriated		297,803,033
Retained income—unappropriated	308,089,183	96,459,851
Total retained income	308,089,183	394,262,884
Total shareholders' equity	626,956,229	713,093,495
Total liability and shareholders' equity	1,153,093,983	1,252,421,321

APPENDIX V

The Baltimore and Ohio Railroad Company comparative income statements for the years 1957 to 1961, inclusive

(000 omitted)

Accounts	1957	1958	1959	1960	1961
Railway operating revenues:					
Freight	$414,084	$340,037	$349,365	$340,022	$306,395
Passenger	18,645	15,103	14,536	15,884	14,621
Mail	7,292	9,330	9,873	10,985	10,288
Express	2,726	1,752	2,561	2,634	1,650
Other transp. revenues	5,320	4,417	4,820	5,089	5,236
Miscellaneous revenues	13,236	11,902	14,024	14,788	13,179
Total railway operating revenue	461,303	382,541	395,179	389,402	351,369
Railway operating expenses:					
Maintenance of way and structure	53,295	39,405	43,546	41,502	47,009
Maintenance of equipment	87,254	68,190	73,431	73,033	67,796
Traffic	12,549	11,389	11,467	11,250	10,018
Transportation	195,498	167,869	169,390	171,409	158,779
Miscellaneous operations	4,624	3,629	3,546	3,220	2,910
General	20,041	18,366	19,632	19,810	17,965
Total railway operating expenses	373,261	308,848	321,012	320,224	304,477
Net revenue from railway operation	88,042	73,693	74,167	69,178	46,892
Railway tax accruals:					
Federal taxes:					
Income	1,240	(994)	(3,457)	(2,438)	199
Railroad retirement	12,107	9,224	10,192	11,016	9,928
Railroad unemployment insurance	3,876	3,689	5,380	6,120	5,516
Other	125	101	87	90	111
Total Federal taxes	17,348	12,020	12,202	14,788	15,754
State, local, and other taxes:					
Property	9,518	9,614	9,946	9,805	9,934
Other	1,827	1,529	1,529	1,523	1,523
Total State and other taxes	11,345	11,143	11,475	11,328	11,457
Total railway tax accruals	28,693	23,163	23,677	26,116	27,211

The Baltimore and Ohio Railroad Company comparative income statements for the years 1957 to 1961, inclusive—Continued

(000 omitted)

Accounts	1957	1958	1959	1960	1961
Railway operating income	$59,349	$50,530	$50,490	$43,062	$19,681
Net rents payable	21,431	21,941	22,439	27,955	37,092
Net railway operating income	37,918	28,589	28,051	15,107	(17,411)
Other income:					
Income from lease of road and equipment	169	172	175	174	173
Miscellaneous rent income	1,929	1,314	1,616	2,096	1,677
Income from nonoperating property	516	501	521	567	582
Separately operated property—profit	77	73	90		2
Dividend income	3,062	3,238	2,889	3,005	1,600
Interest income	961	1,019	546	607	445
Income from sinking and other funds	60	55	70	107	112
Miscellaneous income	38	3,201	1,867	1,489	1,253
Total other income	6,812	9,573	7,774	8,045	5,844
Total income	44,730	38,162	35,825	23,152	(11,567)
Miscellaneous deducted from income:					
Miscellaneous rents	159	153	150	178	129
Miscellaneous tax accruals	334	262	288	291	245
Separately operated property—loss	176	240	265	206	178
Miscellaneous income charges	150	769	345	746	294
Total miscellaneous deductions	819	1,424	1,048	1,420	846
Income available for fixed charges	43,911	36,738	34,777	21,732	(12,413)
Fixed charges:					
Rent for leased road and equipment	582	1,169	1,068	902	861
Fixed interest on funded debt	17,402	17,958	17,620	16,718	16,185
Interest on unfunded debt	432	223	20	248	645
Amortization of discount, on funded debt	373	329	269	261	253
Total fixed charges	18,789	19,679	18,977	18,129	17,944
Income after fixed charges	25,122	17,059	15,800	3,603	(30,357)
Other deductions:					
Contingent interest	991	991	991	991	991
Net income	24,131	16,068	14,809	2,612	(31,348)
Operating ratio (percent)	80.91	80.74	81.23	82.23	86.88
Department charged to operation expenses	$18,560	$19,315	$19,188	$18,917	$18,253

NOTE. Income tax figures in parentheses represent credits resulting from use of accelerated amortization for tax purposes. Other entries in parentheses denote deficits.

APPENDIX VI

Baltimore & Ohio Railroad Company investments in affiliated companies, December 31, 1961

	Percent of voting stock owned	Investments in—			
		Stocks	Bonds and notes	Advances	Total
Owned companies:					
Baltimore & Ohio Chicago Term. R. Co.	100.00	$2,500,000		$8,811,584	$11,311,584
Baltimore & Ohio R. Co. in Pennsylvania	100.00	10,707,334	$46,569,023	(56,039)	57,220,318
Baltimore & Philadelphia R. Co.	99.79	2,233,026	7,429,521	(680,199)	8,982,348
Baltimore Belt R. Co.	100.00	2,022,671	6,414,500	2,648,971	11,086,142
Buffalo, Rochester & Pittsburgh Ry. Co.	99.98	16,762,824	3,763,000	19,985,634	40,511,458
Cincinnati, Indianapolis & Western R. Co.	99.53	2,074,720		7,513,918	9,588,638
Fairmont, Morgantown & Pittsburgh R. Co.	100.00	252,251	5,046,711	(155,148)	5,143,814
New York Transit & Terminal Co., Ltd.	100.00	475,792	1		475,793
Ohio & Little Kanawha R. Co.	99.93	497,444	287,435	824,264	1,609,143
Pittsburgh & Western R. Co.	100.00	8,284,232	32,038,685	(1,065,292)	39,257,625
Quemahoning Branch R. Co.	100.00	250,000	2,567,668	(883,458)	1,934,210
Schuylkill River East Side R. Co.	100.00	3,583,409	13,835,126	(500,902)	16,917,633
Staten Island Rapid Transit Ry. Co.	100.00	1,733,139	7,160,000	2,673,584	11,566,723
Wheeling, Pittsburgh & Baltimore R. Co.	100.00	180,294	8,485,729	(686,014)	7,979,009
Winchester & Potomac R. Co.	98.32	309,843	107,500	450,925	868,269
Jointly owned companies:					
Akron & Barberton Belt Railroad Co.	25.00	28,375		418,228	446,603
Akron Union Passenger Depot Co.	50.00	16,208		35,656	51,864
Cincinnati Union Terminal Co.	14.29	500,000		1,443,569	1,943,569
Dayton Union Ry. Co.	33.33	353,000		820,487	1,173,487
Fruit Growers Express Co.	6.92	826,250			826,250
Illinois Terminal R. Co.	9.09	1,818			1,818
Kentucky & Indiana Terminal R. Co.	33.33	25,000		750,000	775,000
Lakefront Dock & R. Terminal Co.	50.00	4,625,000			4,625,000
Marley Neck-Patapsco Co.	95.77	899,455	424,615	93,540	1,417,610
Monongahela Ry. Co.	33.33	3,678,797			3,678,797
Philadelphia Perishable Products Term. Co.	50.00	25,000	2,000,000	10,394	2,035,394
Pullman Co.	3.41	924,038			924,038
Railway Express Agency, Inc.	4.10	4,100	1,185,537		1,189,637
Richmond-Washington Co.	16.67	445,000			445,000
Trailer Train Company	2.70	63,445			63,445
Washington Terminal Co.	50.00	2,126,000		1,490,500	3,616,500
Other companies		1,721,224	3,728,116	2,575,874	8,025,214
Total		68,138,689	141,043,167	46,510,077	255,691,933

Other investments

	Extent of control	Investments in—			
		Stocks	Bonds and notes	Advances	Total
Reading Company:					
First-preferred stock	42.22	$10,766,127			$10,766,127
Second-preferred stock		13,509,654			13,509,654
Common stock		40,302,117			40,302,117
Western Maryland Railway Company:					
5 percent cumulative first-preferred stock	42.85	3,479,485			3,479,485
4 percent noncumulative second-preferred stock		234,444			234,444
Common stock		5,886,369			5,886,369
Clearfield & Mahoning Ry. Co.		650	$650,000		650,650
Manor Real Estate Company				$169,263	169,263
Raritan River R. Co.	4.24	84,900			84,900
Dayton & Michigan R. Co.	48.00	904,258			904,258
Other companies		50,499	1,725,480	156,381	1,932,360
Total		75,298,403	2,375,480	325,644	77,999,527

NOTE: Amounts in parentheses represent advances payable by B & O to its affiliated companies.

APPENDIX VII

Conditions to insure the maintenance of existing routes and channels of trade

1. Under applicant's control, B & O shall maintain and keep open all routes and channels of trade via existing junctions and gateways.

2. The present neutrality of handling traffic inbound and outbound by B & O shall be continued so as to permit equal opportunity for service to and from all lines reaching the rails of that carrier without discrimination as to routing or movement of traffic and without discrimination in the arrangement of schedules or otherwise.

3. The present traffic and operating relationships existing between B & O, on the one hand, and all lines connecting with its tracks, on the other, shall be continued insofar as such matters are within the control of applicant.

4. B & O shall accept, handle and deliver all cars inbound and outbound, loaded and empty, without discrimination in promptness or frequency of service as between cars destined to or received from competing carriers and irrespective of destination or route of movement.

5. Applicant shall not do anything to restrain or curtail the right of industries located on B & O's lines to route traffic over any or all existing routes and gateways.

6. Applicant shall refrain from closing any existing route or channel of trade with any carrier on account of its control of B & O.

7. Any party or person having an interest in the subject matter may at any future time make applications to the Commission for such modification of the above conditions, or any of them, as may be required in the public interest, and jurisdiction should be retained by the Commission to reopen the proceeding on its own motion for the same purpose.

APPENDIX VIII

Conditions for the benefit of employees of carriers

ARTICLE I

1. *Definitions.*—Whenever used in this article, unless the context requires otherwise, the words and phrases defined in this paragraph shall be deemed and construed to have the meanings herein set forth.

(a) "Transaction" means the transaction or transactions approved by the report of which this appendix is a part.

(b) "Carrier" means the railroad or railroads which are involved in the transaction, as defined or described in the said report.

(c) "Displaced employee" means an employee of a carrier who is placed in a worse position with respect to his compensation and rules governing his working conditions as a result of the transaction.

(d) "Dismissed employee" means an employee of a carrier who, as a result of the transaction, is deprived of employment with the carrier because of the abolition of his job or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of the transaction.

(e) "Protective period" means that period of time from the date on which an employee is displaced or dismissed to the expiration of 4 years from the effective date of the order authorizing the transaction: *provided, however,* that the protective period for any particular employee shall not continue for a longer period following the effective date of said order than the period during which such employee was in the employ of the carrier prior to the effective date of the order.

2. *Displacement allowances.*—(a) So long after his displacement as he is unable, in the exercise of his seniority rights under existing agreements, rules, and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, during the protective period a displaced employee shall be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the monthly compensation received by him in the position from which he was displaced; *provided, however,* that if any employee elects not to exercise his seniority rights he shall be entitled to no allowance.

(b) Each displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction, thereby producing average monthly compensation and average monthly time paid for in the test period.

(c) If his compensation in his retained position in any month is less than the aforesaid average compensation, the displaced employee shall be paid the difference, less compensation at the rate of the position from which he was displaced for time lost on account of his voluntary absences in his current or retained position, but if in his retained position he works in any month in excess of the average monthly time paid for in the test period, he shall be compensated for the excess time at the rate of pay of the retained position.

(d) Nothing herein contained shall operate to affect in any respect the retirement on pension or annuity rights and privileges in respect of any employee.

3. *Dismissal allowances.*—(a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continu-

ing during the protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction.

(b) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the carriers, shall agree upon a procedure by which the carriers shall be currently informed of the wages earned by such employee in employment other than with the carriers, and of the benefits received.

(c) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the failure of the employee without good cause to return to service after being notified by the carriers of a position, the duties of which he is qualified to perform and for which he is eligible, or in the event of his resignation, death, retirement on pension, or dismissal for good cause.

4. *Fringe benefits.*—No employee of the carrier who is affected by the transaction shall be deprived during the protective period of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, relief, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees on his home road, in active service or on furlough, as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

5. *Moving expenses.*—Any employee retained in the service of the carrier or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction, and within the protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects, for the traveling expenses of himself and his immediate family, and for his own actual wage loss, not to exceed 2 days, the exact extent of the responsibility of the carrier to be agreed upon in advance by the carrier and the employee affected; *provided, however,* that changes in place of residence which are not a direct result of the transaction, made subsequent to the initial change and which grow out of the normal exercise of seniority, shall not be considered within the purview of this paragraph.

6. *Arbitration of disputes.*—In the event any dispute or controversy arises with respect to the protection afforded by these conditions or with respect to their interpretation, application, or enforcement, which cannot be settled by the carriers and the employee or his authorized representatives within 30 days after the dispute arises, it may be referred by either party to an arbitration committee for consideration and determination. Upon notice in writing served by one party on the other of intent by that party to refer the dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the arbitration committee and the two members thus chosen shall select a third member who shall serve as chairman. Should the two members be unable to agree upon the appointment of the third member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a third, or neutral, member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate the third member, which designation when made will be binding upon the parties. The decision of the majority of the arbitration committee shall be final, binding, and

conclusive. The salaries and expenses of the third member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

7. *Losses from home removal.*—(a) The following condition shall apply, to the extent it is applicable in each instance, to any employee who is retained in the service of any of the carriers (or who is later restored to service after being entitled to receive a dismissal allowance), who is required to change the point of his employment within the protective period as a result of the transaction and is therefore required to move his place of residence:

(i) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by his employing carrier for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the date of filing of the application or applications here involved so as to be unaffected by such filing. The employing carrier shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

(ii) If the employee is under a contract to purchase his home, the employing carrier shall protect him against loss to the extent of the fair value of any equity he may have in the home and in addition shall relieve him from any further obligation under his contract.

(iii) If the employee holds an unexpired lease of a dwelling occupied by him as his home, the employing carrier shall protect him from all loss and cost in securing the cancellation of his said lease.

(b) Changes in place of residence subsequent to an initial change caused by the consummation of the transaction and which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this condition.

(c) No claim for loss shall be paid under the provisions of this condition which is not presented within 1 year after the date the employee is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the representatives of the employees and the carrier on whose line the controversy arises and in the event they are unable to agree, the dispute or controversy may be referred by either party to a board of three competent real estate appraisers, selected in the following manner: One to be selected by the representatives of the employees and one by the carrier, and these two shall endeavor by agreement within 10 days after their appointment to select the third appraiser. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

ARTICLE II

1. Any employee adversely affected as a result of the transaction, within 4 years from the effective date of the order approving the transaction, shall receive as a minimum the protection afforded by article I hereof for the period he is adversely affected prior to the expiration of 4 years from the effective

date of the order of approval, and any such employee so adversely affected who has received under such conditions total dismissal or displacement compensation less than that which he would receive by applying the Washington Agreement of May 21, 1936, as limited by paragraph 2 of this article, for the full protective period therein provided from the time he is first adversely affected, shall continue to receive benefits under the terms of the Washington Agreement, as limited, until the total compensatory benefits provided therein for the particular period of service have been paid.

2. In applying the Washington Agreement the coordination allowance provided therein for dismissed employees shall be reduced with respect to any employee who is otherwise employed to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his coordination allowance, exceed the amount upon which his coordination allowance is based; such employee or his representative, and the carriers, to agree upon a procedure by which the carriers shall be currently informed of the wages earned by such employee in employment other than with the carriers, and the benefits received.

3. Any dispute or controversy which may arise with respect to the additional benefits provided by this article II shall be settled in the same manner as provided in paragraph 6 of article I hereof in relation to disputes arising under the latter article.

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APPENDIX D

Interstate Commerce Act

49 U.S.C.:

PREAMBLE

National transportation policy. Act Sept. 18, 1940, c. 722, Title I, § 1, 54 Stat. 899, amended the Interstate Commerce Act, chapters 1, 8, 12, 13 and 19 of 49 USC, by inserting before Part I thereof (chapter 1 of 49 USC) the following provision entitled "National Transportation Policy": "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act [chapters 1, 8, 12, 13, and 19 of 49 U.S.C.,] so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of national defense. All of the provisions of this Act [chapters 1, 8, 12, 13, and 19 of 49 U.S.C.] shall be administered and enforced with a view to carrying out the above declaration of policy."

"§ 5. COMBINATIONS AND CONSOLIDATIONS OF CARRIERS

"(2) *Unifications, mergers, and acquisitions of control*

* * *

"(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

"(c) In passing upon any proposed transaction under

the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."

§ 16, par. (11). *Employment of attorneys by commission.* "The commission may employ such attorneys as it finds necessary for proper legal aid and service of the commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the commission's own instance or upon complaint, or to appear for or represent the commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the commission."

§ 17 (11) Intervention of Representatives of Employees

"Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this chapter and chapters 8 and 12 of this title affecting such employees."

APPENDIX E

Administrative Procedure Act

5 USC § 1006. Hearings; presiding officers; powers and duties; burden of proof; evidence; record as basis for decisions.

In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section—

(a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this chapter; but nothing in this chapter shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 1007 of this title shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 1007 of this title, and (9) take any other action authorized by agency rule consistent with this chapter.

(c) Except as statutes otherwise provide, the proponent

of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 1007 of this title and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

5 U.S.C. § 1007

INITIAL DECISIONS; CONCLUSIVENESS; REVIEW BY AGENCY; SUBMISSIONS BY PARTIES; CONTENTS OF DECISIONS; RECORD

"In cases in which a hearing is required to be conducted in conformity with section 1006 of this title—

"(a) In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to sub-section (c) of section 1004 of this title, any other officer or officers qualified to preside at hearings pursuant to section 1006 of this title) shall initially decide the case or the agency shall require (in specific

cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers made the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

"(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

* * * * * * *

"§ 1009. JUDICIAL REVIEW OF AGENCY ACTION

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

"*Rights of review*

"(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"*Form and venue of proceedings*

"(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

"*Acts reviewable*

"(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the

action meanwhile shall be inoperative) for an appeal to superior agency authority.

"Relief pending review

"(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

"Scope of review

"(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

APPENDIX F

Jurisdiction To Review

28 U.S.C.

§ 1253. Direct Appeals from Decisions of Three-Judge Courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, c. 646, 62 Stat. 926.

28 U.S.C.

"§ 1336. Interstate Commerce Commission's Orders

"Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annual or suspend, in whole or in part, any order of the Interstate Commerce Commission.

"§ 2321. Procedure Generally; Process

"The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

"The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States.

"§ 2322. UNITED STATES AS PARTY

"All actions specified in section 2321 of this title shall be brought by or against the United States.

"§ 2323. DUTIES OF ATTORNEY GENERAL; INTERVENORS

"The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

"The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

"Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

"The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

"§ 2324. STAY OF COMMISSION'S ORDER

"The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

"§ 2325. Injunction; Three-Judge Court Required

"An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

(8389-9)

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In the Supreme Court of the United States

OCTOBER TERM, 1963

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES ET AL.,

Appellants,

v.

UNITED STATES OF AMERICA
INTERSTATE COMMERCE COMMISSION
BALTIMORE & OHIO RAILROAD COMPANY
CHESAPEAKE & OHIO RAILWAY COMPANY

Appeal from the United States District Court for the Eastern District of Michigan, Southern Division

---

MOTION TO AFFIRM

THE CHESAPEAKE & OHIO RAILWAY COMPANY

By EDWARD K. WHEELER
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THE BALTIMORE & OHIO RAILROAD COMPANY

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In the Supreme Court of the United States

OCTOBER TERM, 1963

Nos. 510 and 511

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES ET AL.,

Appellants,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

Appeal from the United States District Court for the Eastern District of Michigan, Southern Division

---

MOTION TO AFFIRM

of

The Chesapeake & Ohio Railway Company

and

The Baltimore & Ohio Railroad Company

The Chesapeake & Ohio Railway Company (C&O) and The Baltimore & Ohio Railroad Company (B&O), pursuant to Rule 16, paragraph 1, of the Revised Rules of the Supreme Court of the United States, move that the judgment of the District Court be affirmed.

STATEMENT

These are direct appeals from the final judgment of a specially constituted District Court of three judges established pursuant to Section 2284 of the Judicial Code (28 U.S.C. § 2284) dismissing Appellants' complaints to set aside an order of the Interstate Commerce Commission. The final judgment dismissing the complaints was entered August 28, 1963, on the basis of an opinion filed August 13, 1963 (—— F. Supp. ——). Notice of appeal was served on September 11, 1963. On September 30, 1963, appeal papers were filed with this Court by Appellants Brotherhood of Maintenance of Way Employes and Railway Labor Executives Association (No. 510); and on October 1, 1963, by Appellants Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, The International Association of Machinists, and The Brotherhood of Railway Carmen of America (No. 511).

Appellants challenged a report and order of the Interstate Commerce Commission, served December 31, 1962, which authorized C&O, in accordance with Section 5(2) of the Interstate Commerce Act and subject to specified conditions, to acquire stock control of B&O. *Chesapeake & Ohio Railway Company—Control—Baltimore & Ohio Railroad Company*, 317 I.C.C. 261 (1962). On February 1, 1963, and following hearing, a motion for an order temporarily restraining the Commission's order was denied by District Judge Thornton. C&O thereupon consummated control of B&O, as it was required by the terms of its offer to do. The full three-judge Court heard and denied, on May 1, 1963, a motion by intervener complainants (Appellants in No. 511) for a preliminary injunction directed against the continuation of control.*

* With the consent of the intervener railroad defendants, District Judge Thornton entered an order which, broadly speaking, prevented C&O and B&O *pendente lite* from taking any action,

The three-judge Court heard a full day's argument on the merits on May 23, 1963. Its subsequent opinion analyzed Appellants' contentions and rejected them. The District Court tested the Commission's determination in the light of standards which this Court has very often delineated—both the general standards which must be met by administrative determinations, and the particular standards to which the Commission must adhere in exercising the authority granted to it under Section 5(2) of the Interstate Commerce Act. The District Court was clearly persuaded that the Commission's action was in full compliance with all of them.

ARGUMENT

The grant of a motion to affirm is fully warranted in the present circumstances. When the Commission has carefully subjected a great mass of evidence to its own expert appraisal, and when a District Court has unanimously found and persuasively demonstrated that the Commission followed proper standards in doing so, this Court should not be required to restate principles which are thoroughly understood and unchallenged. The principles which govern the Commission's discharge of its duties under Section 5(2) have been very adequately portrayed. *E.g. McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944); *Schwabacher* v. *United States*, 334 U.S. 182 (1948); *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298 (1954); *Minneapolis & St. Louis Ry. Co.* v. *United States*, 361 U.S. 173 (1959).

This is merely another case involving the adequacy of findings and the supporting evidence. The appeals pre-

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as a result of the effectuation of control, which would prejudice such of their employees as were represented by complainants. This restraint, again with the consent of the intervener railroad defendants, was continued pending disposition of the present appeal, conditioned upon an appeal's being docketed by October 1, 1963.

sent no novel questions (cf. *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151 (1957)), no sharp question of statutory interpretation (cf. *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169 (1961)), and no question as to the scope of the Commission's jurisdiction (cf. *County of Marin* v. *United States*, 356 U.S. 412 (1958)). There are no questions which are unusual, difficult, or substantial, requiring plenary consideration by this Court. Appellants have simply been disappointed by the Commission's decision authorizing a C&O-B&O affiliation, and with the District Court's sustaining that decision. They are now hopeful that they can persuade this Court to sit in substitution of the Commission to resurvey the mass of evidence in the Commission proceedings. Opposition to a railroad consolidation on general grounds, involving only the adequacy of findings and evidence, has been determined not to present substantial questions. See *City of Nashville* v. *United States*, 155 F.Supp. 98 (M.D. Tenn. 1957), affirmed upon motion, 355 U.S. 63.

1. Appellants attack the adequacy of only those findings, and of their supporting evidence, which dealt with the competitive effects of a C&O-B&O affiliation upon other carriers. As to this, the District Court perceptively noted that it was "significant," while "not controlling," that no carrier had joined the present Appellants in this claim. It is certain, indeed, that the point which Appellants seek to lay before this Court has strange advocates. Here are organizations of railroad employees, not complaining about the aspects of the Commission's decision which provided protective conditions for the benefit of labor (conditions more beneficial to labor than those recently approved by this Court in *Brotherhood of Maintenance of Way Employes* v. *United States*, *supra*), but complaining about the possibilities of injury to other rail carriers. In reverse circumstances, if other rail carriers were the only opponents of a C&O-B&O affiliation, and if the grounds of opposition were the alleged injurious im-

pact upon railway labor, this Court might well view such claims with skepticism. Here, it is reasonable to believe that, had the Commission misconceived the possibilities of injury to other rail carriers from a C&O-B&O stock affiliation, opposition would be voiced by the affected rail carriers.

In the District Court, Appellants enjoyed the support of the Department of Justice. The Department of Justice on behalf of the United States, in its answer as a statutory defendant, took "no position on the ultimate question whether the proposed acquisition is consistent with the public interest," but confessed that the Commission's order was "not supported by adequate findings upon substantial evidence with respect to the impact upon other railroads of the proposed acquisition by the Chesapeake & Ohio Railway Company of control of the Baltimore & Ohio Railroad Company." The United States has now determined that C&O control of B&O "is in the public interest" (see, *infra*. p. 14), and the support which Appellants enjoyed in the District Court has been withdrawn. More importantly, the United States has withdrawn its support from Appellants under circumstances which rob Appellants' claims of any significance. Appellants address themselves to a cause which, if not legally moot, has been rendered devoid of any practical question which merits this Court's consideration. The significance of this withdrawal of support by the United States can be better understood against a fuller background of the Commission proceedings and decision.

2. C&O undertook in 1960 to acquire stock control of B&O by offering B&O stockholders an opportunity to exchange their B&O stock for stock in C&O. This C&O offer was countered by a similar exchange offer to B&O stockholders by The New York Central Railroad Company (Central). Competitive applications to acquire control of B&O were filed by C&O and Central, C&O's appli-

cation being filed in June, 1960. C&O's application explicitly stated that C&O and B&O intended, from the base provided by stock affiliation, to plan for a merger between the two carriers at the earliest practicable date.

The fact of competitive applications, the size and experience of the competitors, and the character of the allies who came to their aid,* assured a bitter contest before the Commission. At the consolidated hearing, there was a prolonged and detailed exposure of, and inquiry into, every facet of the public interest considerations involved in a C&O-B&O affiliation. Salient facts respecting the proceedings are these: they involved about 150 parties represented by 69 lawyers; the hearing occupied 37 days, was held in 7 cities, heard 394 witnesses, required 5,686 pages of transcript, and involved 550 exhibits; typical Commission procedures were followed, involving an Examiner's Recommended Report (which was favorable to a C&O-B&O affiliation), exceptions to the Report, replies to the exceptions, and oral argument before the entire Commission; the Commission's decision (reached by a majority of 8 to 3) was served slightly more than two and one-half years after the application was filed.

Appellants, in focusing upon the Commission's appraisal of the competitive effects of a C&O-B&O affiliation, have provided this Court with a highly distorted view of the Commission's decision. The Commission, in appraising the mass of evidence before it, was obviously required to determine whether C&O stock control of B&O had merit, as well as to consider whether such possible merit was offset by disadvantages. In appraising the affirmative aspects of the proposed affiliation, the Commission concluded that it offered outstanding benefits in the public interest. Appellants, though occasionally deprecating the significance of

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* Central had the continuous support of such parties as the State of New York, the New York Port Authority, the Commonwealth of Massachusetts, and the New England Council.

this aspect of the Commission's determination have never seriously challenged it. Neither did the Commission dissenters nor anyone else.*

The Commission's decision may be said to have flowed along the following lines: B&O having fallen into monstrous debt during the depression, has ever since been plagued by financial weakness which two voluntary reorganizations and a 1955 refunding operation failed to solve. Compelled to apply most of its surplus funds to debt reduction, B&O lacked the capital (1) to modernize its properties, (2) to undertake cost-reducing capital improvements in anything like the degree required, and (3) to maintain adequately its physical properties which slowly sank into deplorable condition. Financial weakness imposed cumulative and accelerating penalties since functionally-obsolescent and inadequately-maintained properties forced artificially high operating expenses. B&O, saddled by high-cost operations, forced into uneconomic practices, constantly driven to wasteful, stop-gap measures, became more and more unable to do those things which became increasingly imperative. The downhill slide became alarmingly abrupt in 1961 when B&O suffered a net operating deficit of $31.3 million and when its net working capital position declined, by yearend, to a negative figure of $24.4 million (317 I.C.C. at 271-272).**

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* Commissioner Tucker, joined by Comissioner Webb in dissent, noted: "I must again reiterate that I see no harm in an appropriate B&O-C&O affiliation, in and of itself" (317 I.C.C. at 318), and that "a B&O-C&O system might even become a desirable instrument of public policy" (*Id.* at 331). Dissenting Commissioner Bush did "not feel apprehension against any appropriate alignment of these railroads but I would prefer to see it applied for as a good, solid, constructive merger proposal" (*Id.* at 332).

** The Record contained, and the Commission referred to, many illustrations of the vicious downward drag imposed on B&O by its own financial weakness. B&O's direct derailment expenses were running at a rate almost ten times as great as those of C&O. B&O's inability to maintain its properties adequately was the

The Commission also determined that: B&O, mortgaged virtually to the hilt, had exhausted all expedients for raising capital available within its own resources and required an infusion of capital from outside if it was to survive as an effective transportation medium. The proposed affiliation of C&O and B&O would unite two well-adapted partners (who are little competitive) and would provide B&O with an answer to its problems. C&O, since World War II, has spent nearly $2 billion in completing a modernization program for its properties and maintaining them; C&O has the experience and financial strength, and (with stock control of B&O) would have the incentive, to undertake for B&O just such a rehabilitation program as B&O so imperatively requires and as C&O has completed for itself. C&O presented concrete plans (which the Commission analyzed in detail and approvingly) to assist B&O in quarter-billion dollar modernization and rehabilitation program which would restore B&O as an effective and adequate instrument of commerce.*

The Commission continued: B&O's failure to survive would deal a heavy blow to the shipping public in the important eastern states in which it operates. The needs

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cause of these wasted millions in derailment expenses. The "appalling" condition of B&O's rolling stock (the characterization is the Commission Examiner's which the Commission adopted, 317 I.C.C. at 334) at times forced the closure of coal mines for lack of coal cars—with consequent hardship to mine owners and employees. (See e.g. Ex. H-185, p. 5; Ex. H-172, pp. 3-4).

* Dissenting Commissioner Tucker's strong statement on this aspect of the case was: "No party in this case has questioned the need for improving B&O's facilities or that these [C&O's] plans would meet B&O's requirements" (317 I.C.C. at 311). The Department of Justice recognized the public stake in improving B&O's facilities and service. The Department's press release which accompanied the filing of its answer in the District Court, quoted the Attorney General as saying: "We are aware of the difficulties the B&O has had. The B&O is in our view entitled to expeditious action by the Commission in obtaining essential information and making the necessary determinations."

of commerce and of national defense, which dare not be ignored, are of paramount importance to the country. C&O control of B&O is not a merely a temporary palliative for B&O's problems, but reflects an effort by the railroads themselves to work out their long-range problems. Through the use of joint facilities and personnel and the pooling of equipment, all made possible by the community of interest consequent upon the affiliation, both railroads would be able to achieve substantial reductions in operating expenses. Less expensive and more efficient operations by both railroads would contribute to the national interest in an adequate transportation system. Insofar as B&O is concerned, its properties "are in dire need of rehabilitation" (317 I.C.C. at 275), and unless "major improvements - - - are undertaken immediately, its ability to compete with other railroads and other modes of transportation will be seriously jeopardized" (*Id.* at 290-291).*

Against this appraisal of the benefits of a C&O-B&O affiliation, the Commission weighed claims of disadvantages. The New York Central Railroad Company presented evidence in opposition to a C&O-B&O affiliation, claiming that such an affiliation (in conjunction with a seven-carrier combination, founded on Pennsylvania and Norfolk & Western, which Central wrongly postulated)

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* Appellants in No. 511 say (J.S., pp. 8-9) that "this case involves two great obsessions against change which are strangling railroad service in our Nation: (1) That of ICC against moderization of its procedures to meet current and future public needs; (2) that of the railroads against modernization of their performance to meet current and future public needs." As to the alleged "obsession" of the railroads, these railroads point out that Appellants say this in a proceeding in which they are *opposing* an affiliation which will make it possible for B&O to undertake a vitally needed quarter-billion dollar modernization program. An independent expert referred to B&O as "an organization shaken by reason of inability to do the things they long realized should be done to make the Baltimore and Ohio an efficient operating organization." (Ex. H-174, p. 22).

would divert such large amounts of freight traffic from it as to destroy its competitive abilities.* The Commission carefully examined Central's evidence on this score and concluded that it had "little probative value" (317 I.C.C. at 281). It also examined the traffic divertibility studies of both B&O and C&O and found the principles upon which they were constructed to be sound. From this and other evidence extensively discussed in its report, the Commission determined that a C&O-B&O affiliation would not unduly injure any other rail carriers and would not seriously affect their abilities to render an adequate transportation service.

3. The Commission's conclusion that neither Central nor any other rail carrier would suffer "undue diversion" of traffic drew the principal fire of Appellants below. Appellants relied heavily on the dissenter's characterization of this finding as a "groping, meaningless generalization" (317 I.C.C. at 319) which could never withstand judicial review. They argued that the Commission was required to find precisely how much traffic diversion from New York Central, if any, the Commission foresaw, and that the absence of any definitive finding on this score destroyed the validity of the Commission's decision.

The District Court concluded that the Commission "was not required to engage in speculation and guesswork to come up with a precise percentage prediction." This con-

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* Other rail carrier interveners were: Chicago and Eastern Illinois Railroad Company, which originally sought inclusion, but withdrew upon reaching a consolidation agreement with L&N (Transcript of Commission Hearing, pp. 3138-3139); The New York, New Haven and Hartford Railroad Company which intervened solely to assure that existing rail routes would remain open and was early satisfied on this score (*Id.*, p. 153); the Boston and Maine Railroad Company which intervened as its "interests may develop" and never opposed the merits of the application; and the Pittsburgh & Lake Erie Railroad Company, a subsidiary of New York Central, which participated in Central's opposition as a family line.

clusion is so clearly correct as to present no substantial question for this Court's determination. The Commission recognized that "the volume of traffic diversion cannot be determined with mathematical precision" (317 I.C.C. at 280) and it wisely refused to couch a finding in mathematical terms when to do so would merely give a delusive implication of certainty where none can exist. Even if the Commission had determined in specific mathematical terms the amount of traffic diversion which it foresaw, it would still have been required to determine whether this percentage of diversion was outweighed by such other factors as the public stake in the rehabilitation of B&O—i.e., whether this amount of diversion was "undue."

The very vigor of Central's opposition to a C&O-B&O affiliation did, however, provide Appellants with the cue for the second of their two principal arguments. Exhaustive analyses of Central's traffic were presented by B&O and C&O, all establishing conclusively that no significant amounts of Central's traffic could be diverted. There were perhaps 2,000 pages of testimony focused upon the expansive claims of Central as to traffic diversion. Since no other carrier claimed that a C&O-B&O affiliation would divert traffic from it, there was no evidence by any other carrier, no critical counter-study by C&O or B&O, and no occasion for the Commission as extensively to discuss what none of about 150 parties urged. In this very absence of affirmative claims of traffic diversion by other rail carriers, Appellants found their opportunity to urge that there was no adequate evidence to support the Commission findings that there would be no significant harm to rail carriers *other than Central*, though other evidence affirmatively negated the likelihood of such injury.

The District Court's opinion persuasively disposed of this claim. The District Court pointed out that representatives of a large number of major shippers testified that a C&O-B&O affiliation would not cause any change

in their habits of choosing rail carriers, and found their testimony "of impressive weight." * These witnesses testified unanimously that a C&O-B&O affiliation would not cause their companies to divert traffic from or be injurious to other rail carriers. Many testified affirmatively that a C&O-B&O affiliation would be advantageous to other eastern rail carriers since B&O's improvement would hold traffic to rails which was now being lost to competitive truck or water lines or to private carriers. This is hard and realistic evidence which clearly supported and required the Commission's findings that a C&O-B&O affiliation could not affect significantly and adversely the ability of any other rail carrier to render adequate transportation service.

Additionally, the Commission took into account and discussed the voluminous evidence of C&O and B&O officials which revealed, in almost ultimate detail, the complete flow of freight traffic in the territories where they operate. Officials of both B&O and C&O analyzed this mass of documentation and showed that as a practical matter they could not divert significant amounts of freight traffic from any of their competitors. A variety of considerations, founded on self-interest, would even render it disadvantageous to attempt to do so.** Furthermore, while a

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* Among several hundred witnesses, many testifying at the behest of C&O or B&O and many more testifying at the behest of Central, were representatives of such major shippers as Anchor Hocking Glass, Consolidation Coal, Dow Chemical, Eastman Kodak, Ford Motor, Island Creek Coal, Koppers, E. J. Lavino, Mead, National Distillers, Owens-Illinois Glass, Pennsylvania Glass Sand, Quaker Oats, Studebaker, and West Virginia Pulp & Paper.

** A concrete example may illustrate the looseness of charges the Commission lacked evidence on the effect of a C&O-B&O affiliation upon other rail carriers (not including New York Central). Below, it was suggested that since C&O and the Norfolk & Western Railroad Company operated many competitive routes it must be true that B&O would henceforth divert to C&O its traffic previously interchanged to Norfolk & Western. But the record showed (Ex. H-90) that B&O has relatively little traffic to deliver

C&O-B&O affiliation was confined to a stock control relationship, respect for the interests of the stockholders in the two companies would effectively prevent their pursuing other than their own self-interest. With a very full picture of freight traffic flow in the northeast quadrant of the United States, and with definitive studies proving that a C&O-B&O affiliation provided no opportunities to divert significant volumes of traffic from such a principal rail competitor as Central, the Commission was in a position to exercise its special competence to appraise all competitive effects. *Market St. Ry. Co.* v. *United States*, 324 U.S. 548.

4. There has never been any merit in, or any substantial question raised by, the claims that the Commission failed to consider the effects of the C&O-B&O affiliation upon other rail carriers. But, if there had been, the recent action taken by the United States would effectively rob the issue of all practical significance. On April 5, 1962, in his Transportation Message to Congress, President Kennedy, noting that there had been a resurgence of consolidation activity among both rail carriers and air carriers, announced the formation of an Interagency Committee on Transportation Mergers (which included representatives of the White House and of the Departments of Justice, Commerce, and Labor) to formulate Government policies upon projected consolidations.* At the time when the Department of Justice partially supported Appellants' claims in the District Court, the Interagency Committee had not yet been able to formulate its recommendations. By October 1, 1963, governmental policy had been formu-

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to Norfolk & Western and receives well over twice as much from N&W. B&O could not afford to risk attempted diversion from N&W when to do so would invite retaliatory diversion efforts by N&W.

* See *Message from the President of the United States Relative to the Transportation System of our Nation*, April 5, 1962, H. Doc. 384, 87th Cong., 2nd Sess.

lated, and on that date Assistant Attorney General Orrick publicly announced the Government's conclusions. These conclusions, formally stated in hearings before the Commission on a proposal of New York Central and Pennsylvania Railroad to merge, included the following:

> "The Government's conclusion is that ultimate integration of the Chesapeake & Ohio and the Baltimore & Ohio, with proper conditions which may be imposed by the Commission at the time of their projected merger, could create a rational rail network which would permit improved service to the public. The United States supported a labor union appeal of the ICC order approving C&O's acquisition of control of B&O in the District Court, because of concern that the Commission had not adequately analyzed the impact of C&O-B&O affiliation upon other railroads. On the basis of its study, the United States now believes that the acquisition of control is in the public interest, and, if the case were remanded to the Commission, the United States would not oppose approval of the transaction.
>
> "In the meantime, the C&O and the B&O have entered into a stipulation with the Government consenting to a reservation of jurisdiction by the Commission so that the B&O control proceeding can be reopened by the Department of Justice, by any adversely affected carrier, or by the Commission itself when and if necessary to obtain the imposition of additional conditions to deal with any undue diversion of traffic from other railroads."

The stipulation to which the Assistant Attorney General's statement referred is printed as Appendix A to this Motion. As will be seen, the stipulation provides in substance that, should this Court let stand the Commission's approval of a C&O-B&O affiliation, and should it later be found that such affiliation resulted in "undue diversion of traffic from any other railroad in the territory," the Commission may impose such "further conditions and or-

ders as may be necessary and appropriate and in the public interest." This stipulation underscores and reinforces action taken by the Commission at the time it approved a C&O-B&O affiliation. At that time the Commission imposed extensive conditions having to do with the maintenance of rates and routes which were designed to protect rail competitors from undue diversion of traffic, and it then retained jurisdiction to supervise, implement and supplement the provisions which it imposed (See 317 I.C.C. at 345).

In the light of this stipulation, there seems to be no practical reason why this Court should now occupy itself with Appellants' arguments that the Commission failed adequately to consider the effects of a C&O-B&O affiliation on other carriers. Such an affiliation has been in effect since February 4, 1963. It it is having, or will have any unduly adverse effects on competitors of C&O or B&O, these competitors (or any other interested party, including these Appellants) have a forum for alleviation of their grievances. The door to the Commission will be wide open to all interested parties to demonstrate by experience that other rail carriers are being significantly hurt and to demand a cessation of injury. If there could have been any concern for the effects of a C&O-B&O affiliation upon other rail carriers, that concern must have been eliminated by the stipulation entered into between the United States and these Appellees.

On the other hand, this Court's review of Appellants' cause would inevitably postpone, if it would not frustrate, attainment of the great advantages which the Commission foresaw in a C&O-B&O affiliation. Here, the Commission has determined, and neither the Appellants nor anyone else has ever seriously disputed, that B&O's rehabilitation, made possible by C&O stock control and aid, is strongly in the public interest. Where the advantages of a C&O-B&O affiliation are great, and the alleged disadvantages

to others have been guarded against by stipulation, this Court is being asked to engage in a meaningless formalism in measuring the adequacy of the Commission's findings. What the District Court said has sharp practical application to the present situation:

> "The evidence in this case shows that the B&O, one of the very great railroad systems of the United States, is in critical condition. We think that it would be a disservice to the national policy to hazard the exposing of this railroad to continuing crises by postponing the help that appears to be available to it in the control proposal of the C&O."

Appellants in No. 511 suggest that B&O's needs must have been overstated since it reported an operating profit of $1.6 million in 1962. The testimony of B&O's president at the injunction hearing of February 1, 1963, destroyed this argument. He pointed out that even this marginal profit was made possible only by C&O aid, without which B&O would have had a 1962 deficit in the range of $8 million (Transcript of Feb. 1, 1963 Hearing, pp. 129-133). C&O, to alleviate the desperate condition of B&O's rolling stock, commenced leasing coal cars to it even in 1961 (317 I.C.C. at 277). Affidavits before the three-judge Court at the May 1, 1963, injunction hearing show that, by that date, B&O had acquired with C&O assistance almost $90 million worth of such needed equipment as freight cars, coal cars, and locomotives (See Affidavit of Hays Watkins, Jr., C&O Treasurer). B&O began to turn the corner when massive aid provided by C&O commenced to take effect. C&O's $85 million investment in B&O stock (*Ibid.*) provides the assurance that C&O will continue to aid B&O in a quarter-billion dollar rehabilitation program, precisely as the Commission envisaged (317 I.C.C. at 279-280).

5. Appellants further attack the Commission's Report and Order on a basis closely related to their claims previously discussed, and equally mooted from all practical viewpoints by the stipulation. The Commission report, approving a C&O-B&O affiliation, also dealt with and denied a motion by the Delaware and Hudson Railroad Company, joined in by others, including Appellants and the Department of Justice, that the C&O proceedings be consolidated with two other proceedings then pending before the Commission. The first of these involved essentially a merger among Norfolk & Western, the Wabash and the Nickel Plate;* the second involved a merger of the Pennsylvania Railroad Company and the New York Central.**

In the course of the C&O-B&O proceedings the Commission had twice before denied motions by opponents of a C&O-B&O affiliation that the proceedings be consolidated with such other affiliation proceedings among eastern railroad carriers as were then pending. In this third refusal to permit a decision in the C&O-B&O case to be indefinitely postponed, the Commission pointed out that the affiliation here involved was one for stock control, as sharply distinguished from the other two proceedings which were for merger, and that C&O and B&O would have to file a further application for the Commission's approval prior to taking the irrevocable step of merger, at which time any objecting railroad or other interest would have a second full opportunity to present its views. The Commission also held that B&O's situation—its physical and financial difficulties and its urgent needs—rendered it contrary to the public interest to coun-

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* *Norfolk & Western Railway Company and New York, Chicago & St. Louis Railroad Company—Merger* (I.C.C. Finance Docket Nos. 21510 et al.).

** *Pennsylvania Railroad Co.—Merger—New York Central R. Co.* (I.C.C. Finance Docket Nos. 21989 and 21990).

tenance the indefinite delay which the consolidation of all pending proceedings would impose.

This Commission refusal to consolidate applications before it which were dissimilar, unrelated, and at far different stages of the decisional process, presents no substantial question. An administrative agency's determination on how to transact its own business is not a proper subject for judicial review; the relationship between court and administrative agency is such that questions of procedure in ascertaining the public interest are left to the agency's own devising. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). Whether or not to consolidate given applications relates to the proper discharge of the agency's business which must ordinarily be left to the agency. See *Federal Communications Commission* v. *WJR, Inc.*, 337 U.S. 265, 282 (1949); *American Trucking Associations* v. *United States*, 326 U.S. 77, 83 (1945).

Appellants in No. 511 contend that the Commission, in approving C&O stock control of B&O, has pre-determined other pending applications, providing an "overwhelming compulsion" for their approval (J.S., p. 12). It is obvious, however, that the Commission has not in any way fettered its power of decision in other cases. Since the Commission found that C&O stock control of B&O would have no significant impact on other rail carriers, such rail carriers cannot advance it as a reason for approving their applications. Even assuming that C&O stock control of B&O should later prove to have an adverse impact on other carriers (an assumption of fact which we deny could ever occur), this would provide only a reason why C&O stock control of B&O should, pursuant to the stipulation, be further conditioned to prevent this adverse impact. It provides no reason influencing the Commission to approve a railroad unification which it might otherwise find is inconsistent with the public interest.

Appellants in No. 510 argue that, by refusing to consolidate the several proceedings "either for hearing or merely for decisional purposes, the Commission automatically made unavailable to itself evidence which was vital to any meaningful determination of the competitive effects of this proposal upon other railroads . . . . ." (J.S., p. 18). This argument has no merit. The Commission, before approving the C&O-B&O application, was required to be satisfied that it had before it all the evidence needed to prove that the proposal was "consistent with the public interest." It was so satisfied. It determined, on the basis of the mass of evidence to which we previously pointed, that C&O control of B&O would have no significant impact on other carriers. Nothing more was required.

That the Commission did not abuse its discretion in declining to consider the present proceeding with others then pending is solidly confirmed by the hard experience of two decades. As this Court is well aware, Congress directed the Commission to take an expansive approach to the problems of railroad consolidation in the Transportation Act of 1920. Subsection (4) of Section 5 of the Interstate Commerce Act, as it then stood (41 Stat. 481), required the Commission to "prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems." A companion subsection (6) authorized two or more railroads to "consolidate their properties or any part thereof, into one corporation" only if the Commission found among other things that such a consolidation was "in harmony with and in furtherance of the complete plan of consolidation" adopted by the Commission.

The two decades during which the Commission wrestled with the problems posed by the statutory requirements proved, to the satisfaction of Congress, that the generalized, expansive approach to the problems of railroad consolidation cannot work. At least, this approach is un-

workable where the Commission lacks the ultimate power of compulsion, a power which Congress has "consistently and insistently denied the Interstate Commerce Commission." *St. Joe Paper Co.*, v. *Atlantic Coast Line R. Co.*, *supra* at 305. In 1940 the Congress heeded the Commission's reiterated pleas and relieved it of the duty of fashioning a master plan for railroad unification. Congress, instead, determined to rely upon the voluntary initiative of rail carriers in attaining the railroad unifications which Congress deliberately intended to encourage. See *Schwabacher* v. *United States*, *supra*.

It is mistaken to believe that a consolidation of the three pending eastern railroad applications could involve something less than the master-planning which proved a failure. Proponents of a consolidation of proceedings before the Commission repeatedly gave as their reason why the proceedings should be consolidated that the Commission could then consider and determine the "placement" of all eastern rail carriers into two or more "systems." It is sheer fantasy to suppose that the Commission could, in one monster consolidated hearing on all pending merger applications, formulate an acceptable plan for railroad consolidation, and thus resolve the problems of eastern railroads at one stroke.

A consolidated hearing, involving the placement of all eastern railroads, would open up such a welter of contingencies, complexities and issues as would inevitably collapse into an unmanageable mass. It would put a premium on recalcitrance. If the inconceivable came to pass and more than a score of eastern railroads were to agree upon a regional plan, one recalcitrant carrier (or one recalcitrant group of its security holders) could block the entire effort. No one could approach such a proceeding with any hope that it could bear fruit. The District Court, whose penetrating questions at the oral argument developed that what Appellants really seek is no

less than a consolidated Commission hearing to determine a unification plan for all eastern railroads, was correct in its view that "such a program would be but a return to a policy that, after long frustration, was found to be unwise, both by the studies made by the Commission and by the Congress of the United States." *

6. The contentions of Appellants in No. 511 which rest on constitutional grounds are plainly insubstantial, and even frivolous. The principal claim is that the Commission, by failure to appoint a "public counsel" to represent it at the hearing, permitted the "private litigants" to develop a "one-sided" record. In some manner, which the District Court stated was never made clear to it, Appellants urged that this lack of Commission "public counsel" involved an abandonment by the Commission of "its statutory duty to protect the public interest in this case to the private litigants before it" (J.S., p. 13). The hearing, somehow as a result, so it was urged, involved an unconstitutional denial of due process to the Appellants—though they presented sixteen witnesses and never offered any complaint at the time that the hearing was unfair.

This whole line of argument is queerly out of joint with the most elementary facts of this proceeding. It is scarcely apt to lump as "private litigants" about 150 parties which included the United States (represented by the Department of Justice), states (five governors testified), counties, cities, public service commissions, port authorities, civic organizations, labor unions, shippers, shipper

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* During oral argument, counsel on Appellants' side acknowledged the possibility that a "consolidated hearing" might well expand to include the rationalization of midwestern and other carriers, with which eastern carriers interconnect and whose service areas are in many instances overlapping (Transcript of Oral Argument, pp. 99-101).

organizations, and of course, rail carriers. To suggest that applicants were permitted to develop a "one-sided" record is scarcely compatible with the fact that 333 witnesses were heard in opposition to the application. It is a fiction of Appellants' creation that the Commission could not discharge its duties without its own appointed public counsel (who would in any event merely supplement the duties of the Commissioner's examiner and Department of Justice attorneys).

Whether it is wise or profligate of taxpayer money to employ "public counsel" is clearly a matter of administrative discretion not a matter of constitutional principle. The ultimate propriety of the Commission's determination must be tested by the adequacy of its findings and the substantiality of the evidence, not by claims that it would have been wise to add one more lawyer to the sixty-nine lawyers whom the Commission's decision lists as appearing in the case (317 I.C.C. 261-262). No constitutional requirement is violated by a Commission determination that sixty-nine lawyers are enough to assure an adequate record, beyond the need of having the taxpayers provide the seventieth.

Arguments that Section 5 of the Interstate Commerce Act is an unconstitutional delegation of legislative power, or that *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327 (1945), is controlling, do not in our opinion merit any comment.

CONCLUSION

For the foregoing reasons, we respectfully submit that the appeal presents no substantial issue warranting plenary consideration, and that the judgment of the District Court should be affirmed.

THE CHESAPEAKE & OHIO RAILWAY COMPANY

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THE BALTIMORE & OHIO RAILROAD COMPANY

By KENNETH H. EKIN

APPENDIX A

BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 21160

CHESAPEAKE & OHIO RAILWAY COMPANY—CONTROL—BALTIMORE AND OHIO RAILROAD COMPANY

STIPULATION

It is hereby stipulated and agreed by and between the UNITED STATES OF AMERICA, the CHESAPEAKE AND OHIO RAILWAY COMPANY and the BALTIMORE AND OHIO RAILROAD COMPANY, through their attorneys, that, if the Supreme Court of the United States affirms on appeal the order of the United States District Court for the Eastern District of Michigan, Southern Division, in Civil Action No. 23467, entered August 26, 1963, upholding the validity of the report and order of the Interstate Commerce Commission in Finance Docket No. 21160, dated December 17, 1962, wherein the Commission authorized acquisition by the Chesapeake and Ohio Railway Company of direct control of the Baltimore and Ohio Railroad Company, through ownership of capital stock, and through such control, of indirect control of the common carrier subsidiaries controlled by the latter company, or if the plaintiffs abandon their appeal, then and in either such event the Interstate Commerce Commission may, upon application by the United States Department of Justice, enter under Section 5(9) of the Interstate Commerce Act a supplemental order providing that, in addition to the so-called traffic conditions imposed by the Commission in the aforesaid report and order (Appendix VII), the Commission shall retain jurisdiction to impose further conditions and orders as may be necessary and appropriate and in the public interest in the event that

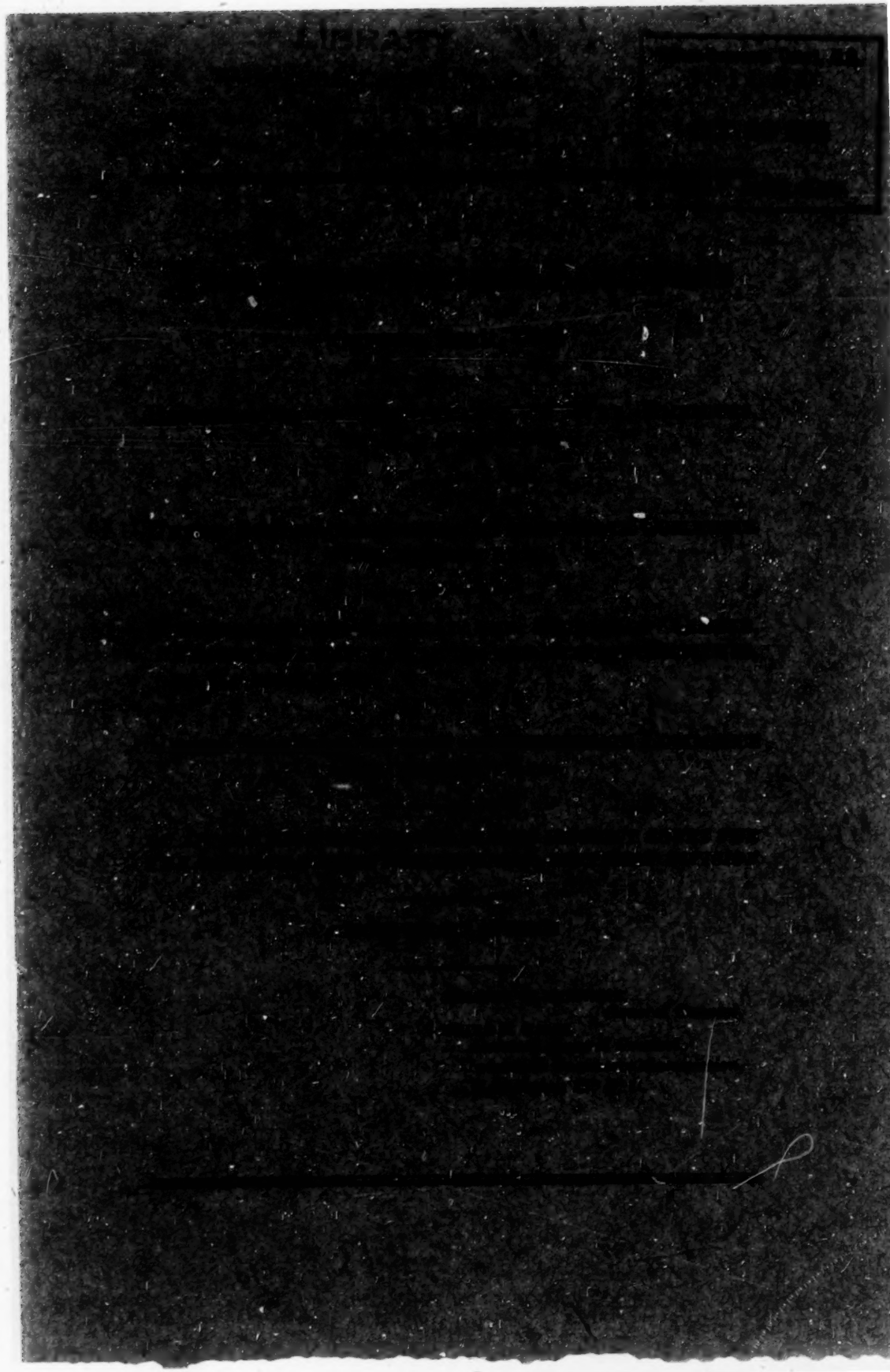
the said control shall be found by the Commission to have resulted in undue diversion of traffic from any other railroad in the territory involved in such transaction; that any party or person having an interest in the subject matter may at any future time make applications to the Commission for the imposition in such event of such further conditions and orders; and that the Commission may reopen the proceeding on its own motion for the same purposes.

/s/ Joseph Saunders
JOSEPH J. SAUNDERS,
Attorney for Un. ed
States of America

/s/ Edward K. Wheeler
EDWARD K. WHEELER,
Attorney for Chesapeake
& Ohio Railway Company

/s/ Kenneth H. Ekin
KENNETH H. EKIN,
Attorney for Baltimore &
Ohio Railroad Company

September 30, 1963



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In the Supreme Court of the United States

OCTOBER TERM, 1963

Nos. 510 & 511

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, ET AL, APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the Interestate Commerce Commission moves that the judgment of the district court be affirmed.

STATEMENT

These are direct appeals, by organizations representing railroad employees, from the final judgment of the three-judge district court dismissing their complaints

seeking to set aside the order of the Commission approving, subject to specified conditions, the application of The Chesapeake and Ohio Railway Company to acquire control through stock ownership of the Baltimore and Ohio Railroad Company.

The application, filed with the Commission on June 14, 1960, was opposed by, among others, The New York Central Railroad Company, which filed rival applications to acquire control of B & O or, in the alternative, to participate with C & O in the joint control of B & O. The several applications were consolidated for hearing, the hearings lasting 37 days and consuming 5,686 pages of transcripts, and throughout the hearings Central remained an active opponent of C & O control of B & O.[1]

Additionally, the United States Department of Justice, the States of Massachusetts, Michigan, New York and Ohio, the Maryland Port Authority, cities such as Battle Creek, Mich., Cleveland, Ohio, Erie, Pa., Evansville, Ind., and New York, N. Y., dozens of shippers, and the Chicago and Eastern Illinois Railroad Company, Boston and Maine Railroad Company, New York, New Haven and Hartford Railroad Company and The Pittsburgh and Lake Erie Railroad Company, as well as the B & O and Central, intervened and participated in the proceedings, as did the Railway Labor Executives' Association, one of the appellants herein.

Following the submission of briefs, the examiner's report and recommended order conditionally approving

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[1] Central withdrew from the proceeding *after* the hearings were completed. The statement by the appellants in J.S. No. 511, p. 14, that as a result "the hearing, and in effect the record, collapsed," is erroneous.

the applications, exceptions and replies, and while the matter was pending for decision before the Commission, The Delaware and Hudson Company and The Delaware and Hudson Railroad Corporation, neither of which had been a party to the proceedings, on August 31, 1962, petitioned the Commission to consolidate the C & O application proceedings for decision with two merger proceedings instituted in the interim, Finance Docket No. 21510, et al., *Norfolk & Western Ry. Co. and New York, C. & St. L. R. Co.-Merger,* and related cases (the N & W-Nickel Plate merger case), and Finance Docket Nos. 21989 and 21990, *Pennsylvania R. Co.—Merger—New York Central R. Co.* (the PRR-Central merger case). In the former proceedings, the hearings had been completed and an examiner's report and recommended order awaited, which report and recommended order subsequently were served April 17, 1963, and in the latter proceedings, the hearings were in progress, as they continued to be, with intervening recesses, until October 2, 1963. The consolidation was urged so that "the most soundly conceived alignment of all the various railroads in the East will be accomplished" and was supported in principle by the Department of Justice, the Railway Labor Executives' Association and others. On October 24, 1962, the day following oral argument on the merits of the C & O's application, the entire Commission heard oral argument on the proposal for the consolidation of the cases.

The Commission entered its report and order on December 17, 1962. It said that it did not appear that the C & O's acquisition of control of the B & O would

result in any undue diversion of traffic or otherwise injure any railroad and that any benefits which might be expected from the joint consideration of the three cases would be more than offset by the harm to the B & O, and ultimately the public, that the attendant delay in passing upon the C & O's application would occasion. 317 I.C.C. 265. Accordingly, the Commission denied the petition for consolidation, but without prejudice as to whether the N & W-Nickel Plate and PRR-Central merger cases should be consolidated or jointly considered at some later date. 317 I.C.C. 266.

Turning to the merits of the C & O's application, the Commission found that the physical plant and rolling stock of the B & O had greatly deteriorated, and that the requisite replacements and improvements were beyond the means of the B & O to attain by itself. 317 I.C.C. 275, 279, 290-91. It found that the C & O had the financial ability to aid B & O, as it was prepared to do, and that the affiliation would have no material adverse effect upon any other railroads. 317 I.C.C. 282, 290-91. Subject to conditions requiring the maintenance of existing routes and channels of trade and conditions to protect the interests of employees of the two railroads who otherwise might be prejudiced by the transaction, the Commission concluded that approval of the C & O's application would strengthen the B & O, enhance its ability economically and efficiently to meet the needs of the populous and industrially significant portion of the Nation which it serves and be beneficial to the public. 317 I.C.C. 291, 293.

Suit to set aside the Commission's order was brought

January 25, 1963, by the Brotherhood of Maintenance of Way Employes, one of the constituent organizations in the Railway Labor Executives' Association, which was permitted to intervene as a plaintiff a few days later. Three other constituent organizations, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, The International Association of Machinists and the Brotherhood of Railway Carmen of America, subsequently filed their separate complaint in intervention on April 25, 1963.

The Department of Justice answered the original complaint, neither admitting nor denying its allegations, except insofar as the Commission's report was alleged to have been unsupported by adequate findings upon substantial evidence of the effect of the proposed transaction upon other railroads and "upon the structure of the railroad industry in the Eastern United States."

The district court noted, however, that the Department's briefs and arguments made clear that in urging the remand of the case to the Commission for further proceedings, the Department intended "that such further proceedings include the consolidation of the C & O application with two railroad merger applications now before the Commission, and to withhold decision of the C & O matter until conclusion of the hearings on such other applications, to the end that a contemporaneous decision might be made of all the pending control and merger applications which involve the eastern railroads." J.S. No. 510, pp. 2a-3a; J.S. No. 511, pp. 26-27.

Since the entry of the district court's judgment, the

United States has reappraised its position on the Commission's order, and it now offers no opposition to it. In his prepared statement of October 1, 1963, in the PRR-Central merger application hearing, Assistant Attorney General William H. Orrick, Jr., declared, "The United States supported a labor union appeal of the I.C.C. order approving C & O's acquisition of control of B & O in the District Court, because of concern that the Commission had not adequately analyzed the impact of C&O-B&O affiliation upon other railroads. On the basis of its study [of pending merger proposals], the United States now believes that the acquisition of control is in the public interest, and, if the case were remanded to the Commission, the United States would not oppose approval of the transaction."[2] The withdrawal of the Department's opposition is reflective of the conclusion of the President's Interagency Committee on Transport Mergers, as expressed October 14, 1963, by its Chairman, Undersecretary of Commerce for Transportation Clarence D. Martin, Jr., who said in a prepared statement, "We believe the Chesapeake and Ohio-Baltimore and Ohio combination to be in the public interest, particularly in the light of a stipulation allowing the re-opening of the case should an undue diversion of traffic occur."[3]

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[2] Concurrently, the Department announced that it had entered into a stipulation with the C&O and B&O in substance providing that the application proceedings may be reopened for the imposition of further conditions in the event the control shall be found by the Commission to have resulted in undue diversion of traffic. See p. 12, infra

[3] Remarks before Board of Directors, Transportation Association of America, Ponte Vedra Beach, Florida.

The district court's decision reveals a thoroughgoing canvass of the voluminous record developed before the Commission and a careful review of the Commission's report and order, in the light of the applicable statutory standards. Without reiterating the district court's seriatim consideration of the several contentions advanced by the plaintiffs, it suffices here to observe that the district court determined that the Commission's findings sufficiently exposed its view of the evidence and the basis upon which it reached its ultimate conclusion that C & O's acquisition of control of B & O was warranted by the statutory criteria and the evidence adduced at the extended hearings. J.S. No. 510, pp. 12a-13a; J.S. No. 511, p. 36. Moreover, the district court stated that it was satisfied that the Commission committed no errors of law, that its actions were not arbitrary, capricious or in abuse of discretion and that its findings were supported by substantial evidence on the whole record. J.S. No. 510, pp. 19a-20a; J.S. No. 511, p. 42.

ARGUMENT

These appeals present no substantial question warranting plenary consideration by this Court. Whether it should authorize one carrier's acquisition of control of another as being consistent with the public interest is a matter of regulatory policy peculiarly within the province of the Commission. Since, as the district court determined, the order of the Commission came within its statutory authority and was based upon adequate findings supported by substantial evidence, there is no occasion for further hearing by this Court. *City of Nashville, Tennessee* v. *United States*, 155 F. Supp.

98, 103-104 (M.D. Tenn. 1957), aff'd mem. 355 U.S. 63 (1957); *M. & M. Transportation Company* v. *United States,* 128 F. Supp. 296, 298-99 (D. Mass. 1955), aff'd mem., 350 U.S. 857 (1955); *Baltimore Transfer Co.* v. *Interstate Commerce Commission,* 114 F. Supp. 558, 563-64 (D. Md. 1953); aff'd mem., 346 U.S. 890 (1953); *Herrin Transp. Co.* v. *United States,* 108 F. Supp. 89, 93 (E.D. La. 1952), aff'd mem., 344 U.S. 925 (1953); *Missouri Pac. R. Co.* v. *United States,* 4 F. Supp. 449, 452 (E.D. Ky. 1933), aff'd mem., 293 U.S. 524 (1934).

The appellants raise no question as to the sufficiency of the conditions imposed by the Commission for the protection of their members or other employees of C&O and B&O who may be adversely affected by the transaction.[4] *Cf. Maintenance of Way Employes* v. *United States,* 366 U.S. 169 (1961); *Railway Labor Association* v. *United States,* 399 U.S. 142 (1950). Nor do they assert that the considered transaction poses an irreconcilable conflict with the principles of the antitrust laws, *cf., Minneapolis & St. Louis R. Co.* v. *United States,* 361 U.S. 173 (1959); *McLean Trucking Co.* v. *United States,* 321 U.S. 67 (1944), or that it lay beyond the scope of the Commission's jurisdiction to approve. *Cf., County of Marin* v. *United States,* 356 U.S. 412 (1958); *Alleghany Corp.* v. *Breswick & Co.,* 353 U.S. 151 (1957). As the district court incisively observed, J.S. No. 510, p. 7a; J.S. No. 511, pp. 30-31:

> The primary question before us is whether the findings of the Commission are supported by sub-

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[4] The alleged error of the Commission in not imposing conditions affording "protection to employees of any but the carriers directly

stantial evidence on the whole record. As discussed more fully below, we hold that they are.

1. The record evidence of the distress of the B & O was overwhelming, and it stood largely unrefuted. Operating personnel of both the B & O and C & O and an independent consulting engineer testified at great length on the financially-compelled deferred maintenance on the lines of the B & O and of the manifest needs for replacing rails, cross-ties and ballast merely to permit the safe operation of its trains. They testified also with respect to B & O's diminishing fleet of serviceable freight cars and of the need for enlarging tunnel clearances, installing effective signaling systems and otherwise modernizing the plant and facilities of the B & O to enable it efficiently and economically to meet the needs of the shipping public, in competition with other carriers.

They and other witnesses testified in detail of B & O's inability alone to finance the urgent and massive rehabilitation program and of the aid that C & O could and would extend to B & O as an affiliated company. The district court summarized this evidence and, at J.S. No. 510, p. 8a; J.S. No. 511, pp. 31-32, concluded:

> The Commission found, on the evidence, that "Strengthened as a result of control, B & O's ability to meet the needs of commerce and the national defense will be enhanced." We are im-

involved in the transaction", J.S. No. 510, p. 23, was neither presented to the Commission nor urged before the district court and, hence, cannot now be raised for the first time. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37 (1952); *United States* v. *Capital Transit Co.*, 338 U.S. 286, 291 (1949).

pressed that there was substantial evidence in the record to support such findings and that such findings add weight to the Commission's ultimate conclusion that the C & O-B & O affiliation was consistent with the public interest.

Appellants offer no serious challenge to these basic considerations motivating the Commission's actions, though, in a play on words, they say, at J.S. No. 511, p. 20, "B & O's financial and physical condition [did not] *require* said Order approving control." [Emphasis added.] The Commission approval of the transaction, of course, was not dependent upon a finding by it that there were no other alternatives for coping with the B & O's ills but merely that the proposals advanced by C & O were "consistent with the public interest", the statutory standards, among others, considered. "It was unimportant that there were other sources. Even if there were, it was not improper that the [acquiring railroad] should furnish it. Indeed, in view of the considerations making for the unification it was the logical party to do so." *Missouri Pac. R. Co.* v. *United States, supra,* at 4 F. Supp. 459.

2. Abundant testimony related to the probable effect of C & O's acquisition of control of B & O upon the other railroads in the East. Much of it related to the Central, the Central having been the most outspoken opponent of the proposed transaction and the competing carrier assertedly most likely to suffer any loss of traffic if that were the result of the affiliation.

Traffic divertibility studies were introduced by Central and C & O and B & O, and the assumptions under-

lying their studies were subjected to penetrating cross-examination. While recognizing that these estimates of traffic diversion "were prepared on different bases" and "[i]n many respects were not comparable", 317 I.C.C. 282, the Commission, after discussing the premises upon which the Central study was based, concluded, that "[b]ecause the assumptions indulged in by Central are highly speculative, its divertibility study has little probative value." 317 I.C.C. 281.[5] The appellants contended that "the studies offered by Central had more probative value than those of the applicant." J.S. No. 510, p. 21. However, as this Court said in *Alton R. Co.* v. *United States*, 315 U.S. 15, 23 (1942), "The weighing of such evidence involves in part a judgment based on the characteristics of the highly specialized transportation service involved. Thus, as we have said, that function is peculiarly one for the Commission, not the courts." Accord, *Chicago, St. P., M. & O. R. Co.* v. *United States*, 322 U.S. 1, 2-3 (1944); *United States* v. *Carolina Freight Carriers*, 315 U.S. 475, 484, 489-90 (1942).

Wholly uncontested was the testimony of the many responsible shipper witnesses who testified, both with respect to the Central and the other railroads in the East, that the acquisition by C & O of control of the B & O would occasion no change in their allocation[6]

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[5] Central assumed much more than merely a strengthened C&O-B&O system. J.S. No. 510, p. 21. It assumed as well a competitively impotent Central and a mammoth PRR-N&W-Nickel Plate combine confronting it.

[6] The right of shippers to route their traffic is found in Section 15(8) of the Interstate Commerce Act, 49 U.S.C. § 15(8).

of freight among the railroads serving them and that they could not foresee any diversion of traffic from competing lines as a result of the affiliation of the C & O and B & O. Also unrebutted was the testimony of C & O and B & O executives that the railroads would refrain from a deliberate policy of preferential routing or of otherwise raiding the traffic of other railroads in the East in favor of their affiliate.

Also, the Commission imposed conditions upon its approval of the proposed transaction designed to assure the maintenance of existing routes in which the B & O and C & O have participated with competing railroads. 317 I.C.C. 345. Similar conditions previously have been imposed by the Commission and held by the courts as efficacious in preventing diversion of large volumes of traffic following Commission approval of a merger or control application. *Canadian Pacific Railway Company* v. *United States*, 158 F. Supp. 248, 254 (D. Minn. 1958); *New York, C. & St. L. R. Co.* v. *United States*, 95 F. Supp. 811, 814 (N.D. Ohio 1951). Moreover, since the date of the district court's decision, the C & O and B & O, by stipulation with the United States filed with the Commission, have agreed that, if the Commission's order is sustained, "the Commission shall retain jurisdiction to impose further conditions and orders as may be necessary and appropriate and in the public interest in the event that the said control shall be found by the Commission to have resulted in undue diversion of traffic from any other railroad in the territory involved in such transaction".

"Such conditions are designed to maintain and keep

open all routes and channels of trade via existing junctions and gateways, protect traffic and operating relationships, to preserve the routing rights of shippers, and to keep open to all parties the right to return to this Commission for such modifications or supplementation of the conditions as developments may show to be required in the public interest." *Erie R. Co. Merger*, 312 I.C.C. 185, 191 (1960), sustained, *Maintenance Employees* v. *United States, supra.* That the Commission in its report did not attempt to forecast the precise tonnage that might be diverted, notwithstanding such conditions, or identify the carriers in the East who might suffer some loss of freight or to fix the exact point for each where a tolerable diversion of traffic resulting from the transaction might become "undue" does not render its findings deficient, as appellants allege. J.S. No. 510, p. 22; J.S. No. 511, pp. 17-18. In disposing of appellants' contentions, the district court excerpted from the Commission's report and at J.S. No. 510, pp. 9a, 12a; J.S. No. 32-33; 35, stated:

> The Commission was not required to engage in speculation and guesswork to come up with a precise percentage prediction. In its findings, the Commission carefully reviewed the testimony given by Central's witnesses, gave its reasons why it found their estimates unreliable, and reviewed the evidence supportive of its conclusion that the claimed diversion of traffic from Central would not be undue.

* * * * *

> We hold that the Commission did give consideration to the effect of the affiliation on other railroads, that it made adequate findings on the subject and that such findings were supported by substantial evidence.

In view of such imponderables as the shippers' right to route traffic and the effectiveness of traffic solicitation efforts, we submit that the court below was clearly correct in refusing to hold the Commission to a delusive standard of precision in appraising possible diversion of traffic.

3. Appellants allege, at J.S. No. 511, p. 13, that the Commission "abandoned its statutory duty" in not ordering its staff to undertake "an independent investigation of the impact of these applications on the public interest."

The record having been developed exhaustively, both in support of the C & O's applications and in opposition thereto, no need was evident, however, for the Commission *sua sponte* to direct its staff to participate in the proceedings. Neither these applicants nor any other party, including the Department of Justice, suggested at any time during the long course of the hearings that the record was deficient, that they lacked the necessary resources and expertise and that they required the assistance of the Commission's staff to prepare and submit data indicating where the balance of the public interest in the considered transaction lay. To allege, as the appellants now do, that "[b]oth the Commission and the court below treated the absence of opposing evidence as tantamount to proof that the pro-

posed control transaction was consistent with the public interest", J.S. No. 510, p. 20, and that "[t]he applications herein were thus granted almost by default", J.S. No. 511, p. 14, certainly minimizes, if it doesn't impeach, the testimony of the 16 witnesses which the appellants presented, as it casually dismisses the testimony of the more than 300 other witnesses presented in opposition to the transaction. Of the Commission's authority, in addition, to hire independent counsel or experts, the district court, at J.S. No. 510, pp. 14a-15a, J.S. No. 511, pp. 37-38, said:

> A lack of confidence in the reliability and adequacy of the showing made before it may, indeed, prompt it to take such action. In this case, however, there were extended hearings with able adversaries exploring all facets of the issues involved; in addition to the Commission's own concern for it, the public interest was represented by the office of the Attorney General of the United States; the Commission found that the evidence supporting the application was of such quality, credibility and accuracy as to persuade it that the public interest would be served by approving such application. In this context, it can hardly be said that the Commission's discretion was abused in its failure to have undertaken, by counsel and experts employed by it, an adversary attack upon the case made before it.

The request made at the conclusion of the hearings that the proceedings be consolidated with those in the N & W-Nickel Plate and PRR-Central merger cases

was not made to fill an evidentiary void but to assure that "the most soundly conceived alignment of all the various railroads in the East will be accomplished". However, it no longer is for the Commission to accomplish the restructuring of the railroads in accordance with its concept of the optimum allocation of lines. As this Court well stated in *County of Marin* v. *United States*, 356 U.S. 412, 416-17 (1958):

> The congressional purpose in the sweeping revision of § 5 of the Interstate Commerce Act in 1940, enacting § 5(2)(a) in its present form, was to facilitate merger and consolidation in the national transportation system. In the Transportation Act of 1920 the Congress had directed the Commission itself to take the initiative in developing a plan "for the consolidation of the railway properties of the continental United States into a limited number of systems," 41 Stat. 481, but after 20 years of trial the approach appeared inadequate. The Transportation Act of 1940 extended § 5 to motor and water carriers, and relieved the Commission of its responsibility to initiate the unifications. "Instead, it authorized approval by the Commission of carrier-initiated, voluntary plans of *merger* or *consolidation*, if, subject to such terms, conditions and modifications as the Commission might prescribe, the proposed transactions met with certain tests of public interest, justice and reasonableness . . ." (Emphasis added.) *Schwabacher* v. *United States*, 334 U.S. 182, 193 (1948).

Accord, *St. Joe Paper Co.* v. *Atl. Coast Line R. Co.*, 347 U.S. 298, 305, 310 (1954); *Schwabacher* v. *United States*, 334 U.S. 182, 193 (1948).

Moreover, the proposed transaction was not for the permanent integration of the B & O into the C & O. On the contrary, as the Commission found, its approval would not effect the existence of the two railroads as separate corporate entities, with separate sales and operating departments and with their separate corporate policies to pursue. Thus, if there was a need for an overall view of the effect upon the Eastern railroads of the merger of the C & O and the B & O, the N & W and the Nickel Plate and the PRR and the Central, it could not then be taken, for a proposal for the merger of the C & O and the B & O was not (and is not) yet before the Commission. The approval of the stock acquisition in no way committed the Commission to approve the eventual merger of the B & O and the C & O or, for that matter, that of the N & W-Nickel Plate or the PRR-Central. The merits of any application to merge the two roads will have to await consideration by the Commission, and whether the Commission at such time will undertake the joint hearing or consideration of such a merger application proceeding with the then pending merger cases remains to be seen. *Cf., Spokane International R. Co. Control*, 295 I.C.C. 425, 438 (1956), sustained, *Canadian Pacific Railway Co.* v. *United States*, 158 F. Supp. 248 (D. Minn. 1958); *Detroit, T. & I. R. Co. Control*, 275 I.C.C. 455, 489 (1950), sustained, *New York, C. & St. L. R. Co.* v. *United States*, 95 F. Supp. 811 (N.D. Ohio 1951).

It is well settled that whether an administrative agency, such as the Commission, orders the consolidation of proceedings is a matter left to its discretion. *Communications Comm'n* v. *WJR*, 337 U.S. 265, 283 (1949); *Federal Comm'n* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). Certainly, the Commission did not abuse that discretion here. As previously stated, at the time the petition seeking consolidation of the proceedings was filed, the applications of the C & O were before the Commission for its decision. The examiner's report in the N & W-Nickel Plate merger case had not yet been served and the hearings in the PRR-Central merger cases remained in progress. By any fair estimate, to have held up the decision on the C & O's applications until the two merger cases were ripe for decision by the Commission would have meant a delay of approximately two years (and perhaps a delay of several years pending a complex judicial review)—a delay which the record before the Commission established neither the B & O nor the public which it serves could afford.

The evidence before the Commission established that the B & O equipment and plant were in poor condition; that with little prospect of replacing cars and tracks out of current earnings, the cost of attempting to maintain them only sufficiently to meet the present needs of the railroad was a tremendous strain upon the B & O. The delay in the infusion of financial aid, such as the C & O was prepared to extend, which would have been occasioned by the grant of the petition to consoli-

date the proceedings with those in the N & W-Nickel Plate and PRR-Central merger cases would have been injurious to the B & O, and, ultimately, to the public. The record demonstrated a need on the part of the B & O for the prompt financial succor of the C & O. Denial of the petition accordingly was reasonable and proper; it certainly was not an abuse of the Commission's discretion.

The district court in the pungent penultimate paragraph of its opinion, at J.S. No. 510, p. 19a; J.S. No. 511, p. 42, said:

> The evidence in this case shows that the B & O, one of the very great railroad systems of the United States, is in critical condition. We think that it would be a disservice to the national policy to hazard the exposing of this railroad to continuing crises by postponing the help that appears to be available to it in the control proposal of the C & O. We cannot predict at this time how many months or years would be consumed in trying to find the perfect, or merely a better, solution of the problems of our eastern railroads, large and small. As stated by Justice Jackson, reviewing the failure of a nationwide plan, "waiting for the perfect official plan was defeating or postponing less ambitious but more attainable voluntary improvements." *Schwabacher* v. *United States, supra*, 334 U.S. at p. 193. The Commission is satisfied that the approval of the application before it involving

> the C & O and B & O will be a definite step forward in solving this great national problem. We are not persuaded that the Commission is wrong. In all events, it is not our function to substitute our judgment for that of the Commission. *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U.S. 173, 188. The Commission's wisdom and experience, not ours, must determine whether its approval of the C & O-B & O affiliation is consistent with the public interest. *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 87.

4. Appellant's generalized criticism of the Commission's handling of control and acquisition proceedings, J.S. No. 510, pp. 18-19; J.S. No. 511, pp. 10-12, is better addressed to the Congress, as, indeed, it was only last year. *Hearings on S. 3097 Before a Subcommittee of the Senate Committee on the Judiciary,* 87th Cong., 2d Sess. (1962); *Report of the Senate Subcommittee on Antitrust and Monopoly on The Railroad Merger Problem,* 88th Cong., 1st Sess. (1963). There, as here, the appellants professed concern that the proposal of the C & O to acquire control of the B & O, together with the proposals of the N & W-Nickel Plate and PRR-Central, would accomplish a far-reaching realignment of the railroads in the East without any design or plan; there as here the charge was made that these carriers had entered into a conspiracy of silence which prevented the Commission from getting all of the facts necessary for a meaningful determination of the issues; there as here it was

contended that the enormity and interrelation of the problems posed by these cases required the proceedings to be consolidated or, at least, simultaneously considered. The Congress, however, seems to have been unimpressed, for no legislative change was enacted. "[W]e think it fair to read this history as a *de facto* acquiescence in and ratification of the Commission's . . . procedure by Congress." *Power Reactor Co.* v. *Electricians,* 367 U.S. 396, 409 (1961).

5. The Commission requires no reminder of the grave responsibilities entrusted to it under section 5 of the Interstate Commerce Act and the National Transportation Policy. *Maintenance Employes* v. *United States, supra; Minneapolis & St. Louis R. Co.* v. *United States, supra.* Its report and order approving the C & O's acquisition of the B & O amply demonstrate that it approached its task with concern not only for the welfare of the employees affected, the communities served by the railroads and the shippers and receivers dependent upon their services and those of competing carriers but also for the adequacy of railroad service in the area, its economy and its efficiency. *United Staates* v. *Lowden,* 308 U.S. 225, 230 (1939); *N. Y. Central Securities Co.* v. *United States,* 287 U.S. 12, 25-26. It reveals that the Commission fully considered all of the factors to which, under the statute and this Court's decisions, it must give effect in determining whether a proposed transaction is consistent with the public interest; it reveals that the Commission neither exceeded the limits of its dele-

gated authority[7] nor fell short of discharging fully its task.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the district court should be affirmed.

ROBERT W. GINNANE,
General Counsel.

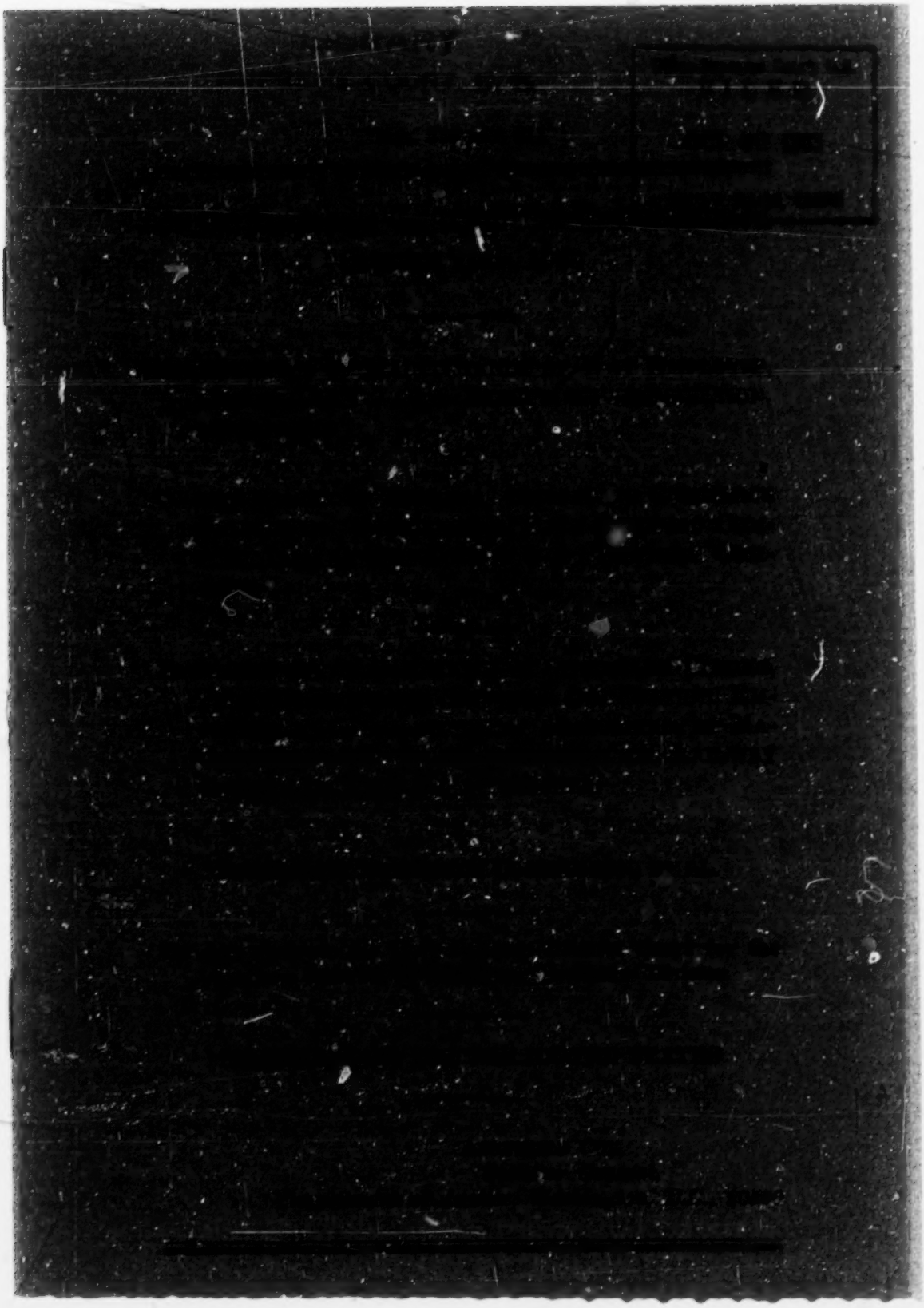
FRITZ R. KAHN,
Assistant General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

October, 1963.

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[7] The Act has been held not to violate the due process clause, *United States* v. *Lowden, supra,* at 308 U.S. 239-40; *Canadian Pacific Ry. Co.* v. *United States,* 158 F. Supp. 248, 256 (D. Minn. 1958), or to exceed the limits of delegable authority. *N. Y. Central Securities Co.* v. *United States, supra,* at 287 U.S. 24-25.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 510

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, AND RAILWAY LABOR EXECUTIVES' ASSOCIATION, APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, BALTIMORE & OHIO RAILROAD COMPANY, and CHESAPEAKE & OHIO RAILWAY COMPANY

No. 511

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, THE INTERNATIONAL ASSOCIATION OF MACHINISTS, and THE BROTHERHOOD OF RAILWAY CARMEN OF AMERICA, APPELLANTS

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v.

INTERSTATE COMMERCE COMMISSION, ET AL.

On Appeal from the United States District Court for the Eastern District of Michigan, Southern Division

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MEMORANDUM FOR THE UNITED STATES

This case presents two appeals by certain labor organizations from a final judgment and decree of the United States District Court for the Eastern District of Michigan, dismissing complaints which sought to set aside an order of the Interstate Commerce Commission authorizing The Chesapeake & Ohio Railway Company to acquire a controlling stock interest in The Baltimore & Ohio Railroad Company. The United States was named as a defendant below pursuant to the requirement of 28 U.S.C. 2322.

In the court below, the United States supported the appellants herein, asserting that the Commission had not made adequate findings as to the impact of the approval of this control application upon other railroads and upon the structure of the eastern railroad industry. However, we took no position on the ultimate question whether the acquisition of control was "consistent with the public interest" under Sections 5(2) of the Interstate Commerce Act (49 U.S.C. 5(2)(b)).

In his Transportation Message to the Congress on April 5, 1962,[1] President Kennedy directed the formation of an Interagency Committee on Transport Mergers for the purpose of formulating a merger policy for the Executive Branch and considering the merits of each pending transportation merger of significance. This Committee, of which the Assistant Attorney General, Antitrust Division, Department of Justice, is a member, has recently completed a study of the effects of this control transaction and of the

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[1] H. Doc. 384, 87th Cong., 2d Sess., p. 8.

two related pending merger applications involving eastern railroads. As a result of this study, the United States is now of the view that the acquisition of control by the C&O of the B&O would serve the public interest in an improved eastern rail network which would provide economical and efficient transportation services. If this case were to be remanded to the Commission, therefore, the United States would not oppose approval of the transaction.

In light of its conclusions as to the ultimate merits of the merger proposal, the United States has refrained from challenging the order and advises the Court that it no longer seeks a remand of this case to the Commission.

ARCHIBALD COX,
Solicitor General.

OCTOBER 1963

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Nos. 510 and 511

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

On Appeal From The United States District Court for the Eastern District of Michigan, Southern Division

REPLY OF APPELLANTS BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES AND RAILWAY LABOR EXECUTIVES' ASSOCIATION TO MOTIONS TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

Nos. 510 and 511

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, ET AL., APPELLANTS

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Appellees' arguments in support of the motions to affirm which have been filed herein were for the most part anticipated and dealt with in our jurisdictional statement, making superfluous any further extended argument at this time on

the issues presented by the appeal. However, the remarkable reversal of position by the United States, whose answer filed in the court below confessed error on the part of the Interstate Commerce Commission and prayed that the Commission's order be set aside, and which had strongly supported, in brief and oral argument, the principal contentions of these appellants, compels us to file this brief reply. We shall accordingly discuss first, the bearing upon this appeal of the position now taken by the United States, in the light of its stipulation with the carrier appellees herein, and will then comment very briefly on appellees' contentions in support of the motions to affirm.

POSITION OF THE UNITED STATES

Under date of September 30, 1963, the date of the filing of our jurisdictional statement herein, the United States and the carrier appellees herein entered into a stipulation, in the proceedings before the Commission in its Finance Docket No. 21160, which appellees rely upon as mooting the contention that the Commission failed to give adequate consideration to the competitive effects on other rail carriers of the C. & O. - B. & O. affiliation. The stipulation was entered into without any knowledge on the part of these appellants, or any advance notice to or service upon them. It is represented as affording ample protection to all concerned against any adverse competitive effects upon other railroads, and hence obviating any need for investigation and consideration by the Commission as to what those effects might be.

In this appeal the United States, without adverting to the stipulation, has now filed a most unusual "Memoran-

dum" which "advises the Court that it no longer seeks a remand of this case to the Commission." Its explanation of this reversal of position is simply that on the basis of an independent study conducted by an Interagency Committee on Transport Mergers for the purpose of formulating a merger policy for the Executive Branch, the United States had concluded that acquisition of control of the B. & O. by the C. & O. would be in the public interest, and that the withdrawal of its previous challenge herein to the validity of the Commission's order was occasioned by "its conclusions as to the ultimate merits of the merger proposal." It is significant that the Memorandum nowhere recites any change of position by the United States with respect to the *validity* of the Commission's order, but merely announces withdrawal of opposition to it.

We submit that the withdrawal of Government opposition to the Commission's order no more supports its validity than did the lack or withdrawal of carrier opposition to the proposal before the Commission relieve it of its statutory obligations. In this connection, the following concluding paragraph of the argument in the reply brief filed by the United States in the court below is particularly relevant:

> "As we pointed out in our Main Brief (pp. 28-29), the inadequacy of the Commission's findings on these points is apparently due to the failure of other carriers to raise them. But we repeat (Main Brief, pp. 17-21) that regardless of the inaction of private parties the Commission may not approve a proposed Section 5 transaction unless it finds the proposal to be consistent with the public interest. And the relevance of the considerations which enter into a public interest determination — spelled out in Section 5 and in the governing Supreme Court decisions — is simi-

larly independent of the conduct of private parties. 'The Commerce Act is the measure of the Commission's responsibilities.'"

The silence of the Memorandum filed herein by the United States, with respect to the basic issue on this appeal —the validity of the Commission's order—speaks eloquently of its reluctance to support the legal propositions urged by the other appellees in support of the motions to affirm.

The "stipulation" entered into between the United States and the carrier appellees (Appendix "A" to carrier appellees' Motion to Affirm) is completely illusory. Aside from the fact that the law requires the Commission to make adequate findings, based on substantial evidence, with respect to the transaction's competitive implications for other carriers *in advance* of approval thereof, the stipulation in question does not and could not afford protection against the future competitive impact that may flow from the C. & O.-B. & O. affiliation. First of all, it is apparent from a careful analysis of its wording that the stipulation provides that the Commission "may" enter a supplemental order to cope with future "undue" traffic diversions that may occur, only "upon application by the United States Department of Justice", and that only "in such event" would other interested parties have a right to be heard by the Commission. And secondly, it is apparent upon consideration of the principal factors that would occasion adverse competitive effects on other carriers — availability of better routes, upgraded equipment, improved terminal facilities, better car supply, more efficient service to shippers — that no "conditions" which the Commission might legally or practicably impose could shelter other carriers from the impact of the C. & O.-B. & O. affiliation. It would have no

authority, even were it so inclined, to require withdrawal by the appellee carriers of benefits of this sort to the shipping and traveling public.

The need for a plenary review herein by this Court is emphasized by the position of the United States. Congress placed in the hands of the Commission the safeguarding of the public interest in transactions of this sort, and imposed certain standards, both substantive and procedural, to be complied with by the Commission in the performance of its function. The net effect of the contentions of appellees, viewed in the light of the foregoing stipulation and the Memorandum filed by the United States, would be to transfer to the Executive Branch of the Government, operating through its Interagency Committee on Transport Mergers, the function of independently determining, without hearing or participation by other parties, the substantive merits of railroad acquisitions or mergers, and to place largely within the discretion of the Department of Justice the weighing of such determinations against the other public interest factors which Congress intended the Commission to consider and pass upon. The prospect of such a clear thwarting of the legislative purpose, in a case of this magnitude, demands plenary consideration by this Court.

OTHER CONTENTIONS OF APPELLEES IN SUPPORT OF MOTIONS TO AFFIRM

Aside from the effect which they seek to ascribe to the change in position by the United States, the Commission and the carrier appellees attempt to support their respective motions to affirm by arguments which were dealt with in our jurisdictional statement. In general, they resist a

plenary review by this Court on the basis that this is "merely" a case involving adequacy of findings and supporting evidence, disregarding the obvious magnitude and impact of the transaction involved, and the fact that in almost *any* court review of a Commission decision the central issues will inevitably relate to adequacy of findings and substantiality of evidence. Discussion of the requirements of the Administrative Procedure Act, and its impact upon standards of review of Commission action, is notably absent from appellees' arguments. Heavy reliance is placed upon the right of the Commission to resort to its presumed "expertise", unaided by discussion or exposition of the factors entering into its determinations. And their arguments, particularly that of the Commission, repeatedly cite the *absence* of evidence before the Commission as to adverse competitive effects upon other carriers, and the lack of opposition by other railroads to the proposed transaction, as factors supporting the validity of the order which is the subject of this action.

These arguments, as well as appellees' reliance upon the Government's change of position, point up what we submit is one of the most important questions confronting this Court — whether the Commission is charged under the statutes with the duty to approve transactions as consistent with the public interest only after receiving substantial evidence and entering adequate findings on the factors to which the law requires it to give consideration, or whether it may infer such consistency on the basis of the absence of introduction of evidence relating to those factors by the parties to the Commission proceedings.

Here, as in the court below, appellees have deliberately

misconstrued the thrust of a number of the arguments set forth in our jurisdictional statement. For example, we did not contend that the Commission had to technically consolidate this case with other pending merger transactions, or formulate a master plan for the Eastern railroad system, but only that it had to consider the transactions in the light of each other, and make appropriate findings here based upon consideration of railroad realignments resulting from the other cases. And we did not contend that the Commission had to make precise mathematical determinations with respect to potential traffic diversion, but did and do assert that it was obliged to couch its findings in terms more meaningful than such conclusory language as "undue".

The unsubstantiality of the testimony of shipper witnesses and officials of the appellee carriers, with respect to potential traffic diversion, was pointed out in our jurisdictional statement. The fallacy of appellees' attempt to attribute significance to the lack of opposition or evidence by other carriers, with respect to the factor of traffic diversion, was extensively demonstrated by Commissioner Tucker in that portion of his dissent commencing at 317 I.C.C. 326.

We submit that the viewpoint of the Commission and the court below with respect to the nature and scope of the inquiry to be made in transactions of this sort, converting a Section 5 (2) case into substantially an adversary proceeding, if adopted, would completely emasculate the statutory requirement that findings be based on substantial evidence. And approval of the Commission's so-called "findings" herein would obviate any need for findings more adequate than the mere recitation of compliance with statutory requirements. In the light of the multitude of pending rail-

road merger proposals, the substantiality of the questions here involved, and the pressing need for their determination by this Court, are overwhelmingly apparent.

CONCLUSION

For the foregoing reasons, it is submitted that the questions presented by this appeal are substantial and of such importance as to warrant plenary consideration by this Court, and that the motions of appellees to affirm the judgment of the District Court should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, THE INTERNATIONAL ASSOCIATION OF MACHINISTS, and THE BROTHERHOOD OF RAILWAY CARMEN OF AMERICA, *Appellants*,

v.

INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF IN OPPOSITION TO THE MOTIONS TO AFFIRM

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IN THE

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OCTOBER TERM, 1963

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v.

INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees.*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF IN OPPOSITION TO THE MOTIONS TO AFFIRM

In attempting to escape the scrutiny of this Court in this appeal, the Appellees have undertaken an extraordinary course of action which aggravates and compounds the errors already committed and confessed in this case by the United States. It is now all the more clear that this is truly a landmark case involving a runaway administrative process in which agencies of the United States are sub-

stituting their *ad hoc* will for the processes of law under the Constitution and statutes of the United States.

The Appellee, Interstate Commerce Commission [Commission] in its Motion to Affirm admits—even claims—at the very outset of its argument that the question of determination of public interest in authorization of control by one carrier over another "is a matter of regulatory policy peculiarly within the province of the Commission." (Commission Motion to Affirm, p. 7) Yet, having failed in the first instance to acquire the knowledge or to make the findings necessary to determine the public interest, the Appellees now reveal a secretly negotiated agreement and other extra-statutory steps that would effectively transfer the protection of the public interest from the Commission under statutory standards, to the care of sundry other parties under completely unknown standards and conditions.

I

The Paramount Question Presented is not Insubstantial Evidence to Support the Findings but a Dispute Over the Meaning and Scope of the Commission's Statutory Duty.

Appellees take similar tacks in trying to characterize this case as merely an every day argument over the substantiality of evidence to support the findings, and then proceed to try to impress this Court with the problems of reviewing a proceeding in which there are thousands of pages of record, hundreds of witnesses and a plethora of intervening parties. (Commission M. A. P. 8; B&O/C&O M. A. p. 3) This is not the great issue in this case.

Apart from the fact that certain of the findings do lack the support of substantial evidence, one of the paramount considerations here is a conflict over the meaning and extent

of the Interstate Commerce Commission's duty to determine "the effect upon the public interest of the inclusion, of failure to include, other railroads in the territory involved in the proposed transaction" as required by §5(2)(c)(2) of the Interstate Commerce Act before approving the control relationship of the B&O and the C&O.

A. *The Commision Erroneously Interprets its Statutory Duty as that of a Judge Rather than a Participant in the Administrative Process.*

The Commission interprets its duty as one merely of a judge to weigh whatever evidence the parties involved choose to offer. It rejects the role of a participant in the administrative process required by law to put into the Record evidence, essential to setting forth the public interest factors so that the Commission can hand down a proper decision fully considering those factors. The very reason for the creation of administrative agencies was to enable an agency to go beyond the role of a judge in cases like this and thereby properly protect the public interest. Commission herein rejects the very role and purpose which led to its creation.

Only New York Central Railroad (NYC) attempted to put in evidence as to the adverse effect upon it as a railroad and it withdrew before presenting any brief on its contentions. The Commission did not attempt to fill the void. For it considered its duty satisfied by the limits of whatever the record might contain. The Commission in its decision made its finding on this theory, for it said it was satisfied in that "No other carrier has asked to be included in the transaction and there is no evidence of record showing that the public interest requires the inclusion of any other carrier" (317 I. C. C. 261, 292).

So also the B&O-C&O Motion to Affirm emphasized this

theory of the Commission's statutory duty: "Since no other carrier claimed that a C&O-B&O affiliation would divert traffic from it, there was no evidence by any other carrier, no critical counter-study by C&O or B&O, and no occasion for the Commission as extensively to discuss what none of about 150 parties urged" (p. 11). Appellees fail to point out that those 150 parties they refer to presented narrow, limited evidence on personal interests and none attempted to or could perform the role the Statute imposes upon the Commission.

B. *The Commission's Narrow View of its Duty Violates the Controlling Statute.*

It is Appellant's contention that the impact on other railroads must be affirmatively found to satisfy the dictates of the Controlling Statute, and that contrary to what Respondents claim, the determination of this impact cannot be made to hinge and totally depend on what the parties who seek their own self-interest might unfold of interest to public concern here. Nor can opposing intervening parties like Appellants here be expected to have the capacity to develop such evidence. Private parties seeking long range self-interest may not find it of advantage to reveal present impact on their profits and loss of their service to the public. All of the railroad parties involved in "the territory" were before or during this proceeding involved in long range merger applications. They wanted like the C&O-B&O to agree among themselves, and then go to the Commission unopposed by other railroads and obtain ready approval under the Commission theory of not being obliged to go into the impact of these consolidations on other railroads beyond what the parties wanted to put in the Record.

C. The Commission Seeks a World of Non-Involvement through Procedural Discretion.

Consistent with this theory the Commission denied the request that it consolidate this record with the records made in the other proposed consolidations so it could determine the impact of the B&O-C&O joinder on these other railroads as consolidated units. It could never know this impact unless it did consolidate and this it refused to do. The Commission now claims that this refusal to consolidate was merely a procedural matter subject to their discretion (Commission M. A., p. 18, B&O-C&O M. A., p. 18). However, whatever the Commission's liking on the question, Congress did not make it a matter for discretion as to whether the Commission should discover and evaluate the impact of the proposed control relationship on other railroads. It explicitly ordered the Commission to discover impact. And this is not satisfied by an obdurate isolationism which confines all observation to what the parties may have the wit to volunteer in the immediate proceeding.

D. The United States, in Fact, Supports Appellants' Contentions.

The United States wholeheartedly attacked this failure of the Commission to make any effort to determine the impact on other railroads in the Court below. The United States Confession of Error appears at Appendix A. It filed lengthy briefs and advanced oral argument in the Court below in ardent support of this contention by Appellants. In its Brief before the District Court, the United States declared:

> "In our view, the law clearly required the Commission, before it approved the proposed acquisition by C&O

> of control of B&O, to ascertain and consider (1) the impact of the proposed C&O-B&O unification upon other railroads, (2) the relationship of the control acquisition to the pending merger proposals of other eastern railroads, and (3) the role of the proposed unification in shaping the industry structure which may emerge from these related plans." (p. 13)

And in its reply brief the United States again gave clear and uncompromising support to Appellants' contentions:

> "The Commission's brief suggests, we believe, that its failure to fully consider the impact of the C&O-B&O transaction upon eastern railroading rests in part upon a misapprehension of the scope of its own power" (p. 8)

E. *The Justice Department Now Attempts to Ride Two Horses.*

Now the Justice Department has assumed a remarkable position. In a Statement before the Commission and relied upon by Appellees here, it declares it continues to affirm that the Commission in violation of its clear statutory duty, failed to find the facts with respect to impact on other railroads; but on the other hand, it now states it has made a study in conjunction with a newly set up "Inter-Agency Committee" which has now decided, without hearings or presentation of evidence, that this control is ultimately in the public interest. [B&O-C&O M. A., p. 14]

This is astonishing. The Justice Department effectively is saying that its Inter-Agency Committee has paralleled the Commission's work and has come to the same conclusion. They purport to have set up a Super-ICC by executive order, which being free of the dictates of Congress,

can set itself apart from the Congressional criteria. However, it was Congress' intention that a control relationship may not be approved in the public interest until a study—presented as evidence in a public hearing—has determined its impact on other railroads in the territory involved. This the Commission has not done, and the Justice Department in spite of its extraparliamentary conclusions does not deny this or reverse the firm position on this matter it took before the District Court.

Here in its Memorandum to this Court, the Justice Department still reaffirms its position that the Commission did not find the impact in the public interest of this control on other railroads as required by statute. It then goes on to say that this control meeets the public interest. [Memorandum for the U. S., p. 2] This remains an inexplicable contradiction.

F. *The Commission Consigns Itself to Rocking Chair Regulation*

But an even more mysterious twist is added to the self-reversing position of the Justice Department. It has announced that it has taken upon itself to enter into a stipulation with the B&O and C&O to the effect that if any adverse impact on other railroads does occur, the Justice Department and the railroads are agreed to have the Commission put further conditions on their operation. Apart from whether it is possible for the Justice Department and these railroads to require the Commission to revise their findings from time to time in the indefinite future, this stipulation is an admission that they have absolutely no idea of what the impact would be from the record in this case. It is also a quite novel theory of regulation: Congress requires certain considerations to be set forth in the public interest in a hearing and on a record; but all of

this can be avoided and the control sought be set up immediately if only the parties stipulate that they are willing to be later bound by such conditions as the Commission might later decide to impose.

This is rocking chair regulation. It is an attempt to lock the barn door after the horse is stolen rather than impose the lock beforehand as Congress provided. It is contrary to the intention of Congress. Congress did not request that parties be willing to be regulated according to certain criteria. It ordered certain data to be developed and considered; it ordered that the public interest be found satisfied in these respects before a control relationship may be entered into, and it explicitly forbade control relationships until these conditions were met. Such regulation requires active, positive effort by the Commission. Congress did not sanction such "let them go at it, wait and see" rocking chair regulation. This stipulation is totally without legal effect and meaning, totally contrary to the regulatory scheme imposed by Congress, and remarkably audacious in its intent and purpose. It can hardly suffice as a future substitute for the Commission's duty to discover *now* the public interest factors in the impact on other railroads of the C&O control of the B&O.

G. *The Commission Tries to Fill a Total Void.*

To fill this complete void of any efforts to find impact on other railroads, Appellees have been stirred by these contentions to point to some casual statements of a few shippers denying any effect from this consolidation. However, the Commission in its Report and Decision never indicated that it even considered shipper testimony in this connection and the Commission cannot plead on appeal a basis for a decision it never heretofore declared. The only mention of reliance on shipper testimony occurs in a paragraph in relation to the effect on the New York Central:

"Equally untenable is the argument that shippers on Central's sidings would divert traffic to the C&O or B&O team tracks." [317 I. C. C. 261, 282]. At any event, these shippers were brought in by NYC and the C&O-B&O to oppose each other's contentions and were concerned essentially with effect on the NYC and not with other railroads, as Appellees try to suggest. [B&O-C&O M. A., p. 12; Commission, M. A. p. 11].

II. *The Commission Absolves Itself of all Responsibility for Approving Regionally Interrelated Merger Schemes.*

The Commission [M. A. p. 16] and the B&O-C&O [M. A. pp. 20-21] claim that Appellants are trying to make the Commision create master plans for railroad systems when Appellants urge that this Record be consolidated with the merger records of the other railroads in its territory.

They point to the fact that Congress long ago relieved the Commission of the duty to come forward with master plans. This is true—but it does not mean that Congress intended that consolidation of particular railroads should be accomplished without considering their effect on other railroads, and that the Commission should not have the power to approve or disapprove the railroad's own efforts towards systematic merger schemes. Congress never intended that the Commission should only look to the good of the particular railroads joined in a consolidation application, as Appellees contend. Congress explicitly gave the Commission a supervisory control of approval over interlocking consolidation proposals in §5(2)(c)(2) which requires a determination of the public interest on the impact of proposed consolidation "on other railroads in the territory involved." Appellees' arguments here are the usual efforts to construe Appellants' contentions to those

extremes that would lead to their rejection, and as such extremes Appellees' contentions warrant rejection here.

II

The Commission's Failure to Test Evidence in the Record on Key Issues of Fact Set Forth Solely By Self-Serving Parties of Similar Interest Cannot Be Dismissed as Insubstantial.

Appellants have contended that the Commission wrongly depended on unexamined, uncontested, self-serving statements of parties of similar interests on issues of fact which the Commission calls crucial to their decision. The Commision constantly resorts to the statements of B&O's great financial distress as the keystone for granting the control approval in the public interest, as a reason for its not stopping to discover the impact on other railroads and as a reason for rejecting consolidation of this record with those of the other pending mergers in this territory. [317 I. C. C., 261, 266]. Appellees' briefs do not face up to this issue.

A. Failure of the Commission to Validate Key Facts in Issue.

In Appellees' Motions to Affirm (Commission p. 9; B&O-C&O, p. 7), they admit the main motivating factor for approval of B&O control by C&O is B&O's alleged financial distress. The Commission in its Decision and Order cites the record that in the year of its hearing the B&O was losing $31 million and that B&O had a need for rehabilitation of close to $250 million which could not be funded by a company operating at such a loss. (317 I. C. C. 261, 265, et seq.) This key issue of fact was put forth only by the B&O and the C&O. No other party had the resources

to conduct an independent investigation, indeed if the railroads would have permitted it. Should these self-serving statements of the B&O's financial distress have been examined and evaluated, and contested? Would it have been a meaningless exercise? Two weeks after the Commission rendered its decision, the B&O and the C&O jointly announced an astonishing improvement in the B&O financial picture. They declared that for the financial year immediately after the one put in the record B&O suddenly turned from a net $31 million loss to a $1.6 million in net profits. Was this some isolated peculiarity which could be easily explained and which could not change this picture painted of such dire distress? Ever since that one great year of loss which they put in the record and on which the Commision so much depended, the profits of the B&O have been increasing more than one hundred per cent each year. On November 1, 1963, the B&O announced that their net income for 1963 "will rise to between $5 million and $6 million from $1,606,700 in 1962." [Washington Evening Star, November 1, 1963]. Then on November 18, 1963, the B&O announced that its net profit for 1964 would "at least double" that of 1963 and would approximate $10 million in total net profit. [Washington Evening Star, November 18, 1963]. This is now just eleven months after the Commission gave its decision "particularly in view of the poor financial conditions of the B&O." [317 I. C. C. 261, 265, 266]. Yet, when Appellants contended that the Commission should have sought aid of Commision Counsel to evaluate these key facts of financial distress which were untested in the administrative proceeding, the B&O and the C&O call this contention "frivolous" (B&O-C&O M. A., p. 21).

So also untested were the facts which the B&O and the C&O jointly put in as to the extent of need of B&O rehabilitations. So also untested were C&O's commitments to provide to the B&O such aid. So also undeveloped and

untested were any facts which would lend some basis to an understanding of what impact this control would have on other railroads. So also unpresented was the evidence which the New York Central put in on the impact of the B&O-C&O consolidation upon its own operation when it pulled out of the case without setting forth a brief opposing the B&O-C&O brief in summary and evaluation of opposing evidence.

B. *The Commision Delegates its Duty to Privately Interested Parties.*

Yet the Commission [M. A., p. 15] and the B&O-C&O [M. A., p. 22] charge this failure to Appellants on the theory that as intervenors we had a right to contest these facts and present opposing testimony and since we did not we cannot be heard to complain. In answer, the main point is not that on these important subjects Appellants did not have the power or resources to command counter-evidence, which it did not. What we contend is that having pursued the right to intervene in this proceeding in which the determinations of public interest adversely affects Appellants own interest, we have a right to insist that this determination of public interest shall only be that formulation of public interest which is properly and precisely determined in accordance with law.

The Commission has a duty to bring forth the facts required in the public interest and Appellants have a right to have the Commission perform this duty. The Commission's performance of its duty was never made by Congress to depend on what parties might plead. As intervenors who will be affected by the outcome, we have the right to have public interest determined fully and properly no matter to what extent we may participate in this determination. Congress imposed no duty on us, only a right to intervene to declare our interests. Upon the Commission, Congress

put an exacting duty to bring forth and to develop on the Record positively the considerations of public interest, and it may not rest secure merely because sixty-nine lawyers representing other interests have entered an appearance, as is suggested by Appellees. [B&O-C&O M. A., p. 22].

C. *Appellants Have a Right of Due Process to a Proceeding in Which the Commission Comes Forward With Evidence enabling it to Determine the Public Interest.*

When the determination of public interest is made to depend on no facts other than the point of fact that parties have neglected to bring forth relevant contentions or data, or made to depend on facts which are merely the uncontested, unsupported self-serving statements of the parties seeking approval, Appellants have been denied a fair hearing and due process of law guaranteed by the Fifth Amendment. Once we have the right to intervene, we have a right to have the Commission come forward with its own Counsel and fulfill its duty and properly determine this public interest on the Record according to its statutory duty. Serious determinations of public interest cannot be made to depend on the vagaries of private interests.

III

Conclusion

This case is the first major approval by the Commission of merger and control applications involving or affecting nearly all railroads in the eastern part of the United States. Railroads all over the Nation are in like circumstances of either being merger applicants or being about to become a party to such an application. If the Commission has a role to perform in deciding this flood of applications—other than to sit as a judge of evidence presented by anyone

who decides to be a party—now is the time to make that duty crystal clear.

Finally, contrary to Appellees' claims, *McLean Trucking* and the other cases they cite [Commission M. A., pp. 7-8] did not consider the Commission's statutory role and duty in a control case which is a part of a nation-wide railroad merger movement. This is a new and important question warranting this Court's review and judgment because of the effect of this case as a pattern upon the nation-wide merger movement now in full flood tide.

The Motions to Dismiss should be denied and plenary consideration be granted.

Respectfully submitted,

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EXHIBIT A

Confession of Error of the United States

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Civil Action No. 23467

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, *Plaintiff*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Defendants*

ANSWER OF THE UNITED STATES OF AMERICA

The United States of America, a defendant in the above action, in answer to the complaint of the plaintiff, admits that the order of the Interstate Commerce Commission is erroneous, in that it is not supported by adequate findings upon substantial evidence with respect to the impact upon other railroads of the proposed acquisition by the Chesapeake & Ohio Railway Co. of control of the Baltimore & Ohio Railroad Co., and therefore fails to reflect the consideration required by Section 5 of the Interstate Commerce Act (49 U. S. C. 5) and the National Transportation Policy (49 U. S. C. preceding 1) to be given to the public interest in the effect of the proposed acquisition upon the structure of the railroad industry in the Eastern United States.

The United States neither admits nor denies any other allegations of the complaint. The United States takes no position on the ultimate question whether the proposed acquisition is consistent with the public interest. The United States favors, however, the earliest possible disposition of this matter, and, upon remand, the most expeditious consideration by the Commission.

WHEREFORE, this defendant prays that the order of the Commission be set aside and the case remanded to the Commission for further proceedings.

Respectfully submitted.

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